CONFERRING OF JURISDICTION ON THE U.S. COURT OF CLAIMS OVER CLAIMS OF THE NAVAJO TRIBE

HEARING

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 1613

TO CONFER JURISDICTION ON THE U.S. COURT OF CLAIMS WITH RESPECT TO CERTAIN CLAIMS OF THE NAVAJO INDIAN TRIBE

NOVEMBER 18, 1981

WASHINGTON, D.C.

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CONTENTS

	Page
S. 1713	2

WITNESSES

Barber, Paul D., attorney for the Navajo Tribe	11
Barlow, Sara W., attorney for the Navajo Tribe	11
Beal, Richard, Chief, Indian Claims Section, Department of Justice	4
Liotta, Anthony C., Deputy Assistant Attorney General, Land and Natural Resources Division, Department of Justice	4
Riggs, Pete, senior member, Navajo Tribal Council, Navajo Nation	11
Salabye, Robert E., member, Navajo Tribal Council	11
Schaab, William C., attorney of record for the Navajo Tribe	11
Tome, Harry, advisory committee, Navajo Tribal Council	11

MATERIAL RECEIVED FOR THE RECORD

Letter from Anthony C. Liotta, dated December 27, 1981, to Senator DeConcini	8
Resolution of the Navajo Tribal Council	12
Resolution of the Black Mesa Chapter, The Navajo Nation	14
Resolution of the Forest Lake Chapter, The Navajo Nation	16
Petition for a writ of certiorari to the U.S. Court of Claims, *The Navajo Tribe, petitioner*, v. *The United States of America*, respondent	19
Additional land claims before the Indian Claims Commission	117
Order approving stipulation	119

APPENDIX

ADDITIONAL MATERIAL RECEIVED FOR THE RECORD

Letter from William C. Schaab, attorney of record for the Navajo Tribe of Indians, with enclosures, to Peter Taylor, general counsel, Select Committee on Indian Affairs	127

CONFERRING OF JURISDICTION ON THE U.S. COURT OF CLAIMS OVER CLAIMS OF THE NAVAJO TRIBE

NOVEMBER 18, 1981

U.S SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
Washington, D.C.

The committee met, pursuant to notice, at 9:10 a.m., in room 1318, Dirksen Senate Office Building, Senator Slade Gorton (acting chairman) presiding.

Present: Senators DeConcini, Melcher, and Gorton.

Staff present: Timothy Woodcock, staff director; and Peter Taylor, general counsel.

Senator GORTON. The hearing will come to order.

Senator DeConcini?

Senator DECONCINI. Mr. Chairman, I would like to have my opening remarks inserted in the record before we begin today's hearing.

Senator GORTON. Without objection, your remarks will be placed in the record at this point.

[The prepared remarks of Senator DeConcini follow:]

INTRODUCTORY REMARKS REGARDING S. 1613 BY SENATOR DECONCINI

The Select Committee on Indian Affairs will be receiving the views of representatives of the Administration and the Navajo Tribe regarding S. 1613. If enacted this bill would confer jurisdiction on the U.S. Court of Claims with respect to certain claims of the Navajo Indian Tribe.

This proposed legislation will require the U.S. Court of Claims to hear the merits of a group of claims against the United States filed in 1950 by the Navajo Tribe. These claims were filed pursuant to the Indian Claims Commission Act of 1946, alleging that the United States breached its legal and treaty obligations as well as its general responsibility to deal fairly and honorably with the Navajo Tribe. The Navajo claims include allegations of mismanagement of tribal resources and specific breaches of the treaty.

Jurisdiction over the claims was accepted when they were filed in 1950, reaffirmed by the Indian Claims Commission in 1975 and at the trial level of the Court of Claims in 1978, following their transfer to that court under Public Law 95-69. Ultimately, the claims were dismissed on a further appeal by the Government, without reaching trial on the merits, when the Court of Claims in May 1979 decided on purely technical grounds that its jurisdiction was barred.

The primary purpose of the Indian Claims Commission Act was to provide a forum where old claims by Indian tribes could be heard on their merits without regard to technical legal restrictions or jurisdiction. The Department of the Interior in recommending passage of the act urged that if those claims were ever to be put to rest, the act must confer jurisdiction broad enough to avoid the lack of finality attending dismissal of a case by the Court of Claims on technical legal grounds, without consideration of the claim on its merit.

After thirty years of litigation, a fair hearing on a group of those claims has been denied. This bill merely carries out the intent of the Indian Claims Commission Act by insuring that these duly filed claims by the Navajo Tribe, like those of other Indian tribes, will have the hearing contemplated by the act.

Senator GORTON. Before we proceed, without objection, I will place a copy of S. 1613 in the hearing record.

[The bill follows:]

97TH CONGRESS
1ST SESSION

S. 1613

To confer jurisdiction on the United States Court of Claims with respect to certain claims of the Navajo Indian Tribe.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 11 (legislative day, SEPTEMBER 9), 1981

Mr. DECONCINI introduced the following bill; which was read twice and referred to the Select Committee on Indian Affairs

---

A BILL

To confer jurisdiction on the United States Court of Claims with respect to certain claims of the Navajo Indian Tribe.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That notwithstanding sections 2401 and 2501 of title 28, United States Code, or section 12 of the Act of August 13, 1946 (60 Stat. 1052; 25 U.S.C. 70k), jurisdiction is hereby conferred upon the United States Court of Claims to hear, determine, and render judgment on the claims of the Navajo Indian Tribe against the United States which were timely presented under section 2 of the Act of August 13, 1946 (60

Stat. 1050; 25 U.S.C. 70a), and later withdrawn without authority with respect to claims that (1) Navajo Reservation lands were taken by the United States or disposed of to others without payment of adequate compensation; (2) the United States failed to fulfill article 6 of the treaty of June 1, 1868 (15 Stat. 667), and to deal fairly and honorably with the tribe in providing educational facilities and services through August 13, 1946, and (3) that the United States mismanaged the lands and resources of the tribe: *Provided*, That jurisdiction is conferred only with respect to claims accruing on or before August 13, 1946, and all such claims must be filed within six months after the date of the enactment of this Act.

O

Senator GORTON. We will call as our first witness Mr. Anthony Liotta of the Land and Natural Resources Division, Department of Justice.

Mr. Liotta, please proceed.

STATEMENT OF ANTHONY C. LIOTTA, DEPUTY ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE; ACCOMPANIED BY: RICHARD BEAL, SECTION CHIEF, INDIAN CLAIMS SECTION, DEPARTMENT OF JUSTICE

Mr. LIOTTA. Thank you, Mr. Chairman.

I am Anthony C. Liotta, Deputy Assistant Attorney General for the Land and Natural Resources Division.

As the committee is aware, S. 1613 would confer jurisdiction on the U.S. Court of Claims to hear claims of the Navajo Tribe of Indians which were previously filed with the Indian Claims Commission under section 2 of the act of August 13, 1946, 60 Stat. 1050, 25 U.S.C. 70a, and dismissed by withdrawal in October 1969, by the attorney of record for the Navajo Tribe.

In 1979 the Court of Claims ruled that the tribe's attorney possessed authority to withdraw the claims in question and stated that:

> The decision to withdraw * * * was a tactical decision similar to those attorneys constantly must make in the conduct of litigation. The plaintiff is bound by the actions of its attorney.

See *Navajo Tribe of Indians* v. *United States*, 601 F. 2d 536, 539, Ct. Cl. 1979.

The claims that were withdrawn were claims 1 through 6 and 8 in Docket No. 69.

In the bill the claims are rather generally represented to be:

> . . . claims that (1) Navajo Reservation lands were taken by the United States or disposed of to others without payment of adequate compensation; (2) the United States failed to fulfill Article 6 of the Treaty of June 1, 1868, 15 Stat. 667, and to deal fairly and honorably with the tribe in providing educational facilities and services through August 13, 1946, and (3) that the United States mismanaged the lands and resources of the tribe: . . .

We wish to point out at the outset that the description of the claims in S. 1613 is entirely too broad and imprecise. Nevertheless, each category of claims warrants attention since enactment of this legislation would have very serious consequences with respect to the conduct of on-going litigation in several dockets.

As to the first category of claims, it is the Government's position that the Navajo Tribe has not asserted any claim for the taking of reservation lands in claims 1 through 6 and 8.

There is no good reason to grant the Navajo Tribe jurisdiction to file any such claim now, more than 30 years after the jurisdictional bar of section 12 of the Indian Claims Commission Act. I refer here to the Act of August 13, 1946, 60 Stat. 1049, 1052, title 25 United States Code, section 70k.

The second category of claims may contain two matters. The first is a claim for the failure of the Government to fulfill article VI of the treaty of June 1, 1868, 15 Stat. 667. This claim for the nonfulfillment of article VI of the 1868 treaty is currently being litigated under claim 7 of Docket No. 69 in the Court of Claims.

The second of these two claims is the alleged failure of the Government to deal fairly and honorably with the tribe in providing educational facilities and services through August 13, 1946.

If this is meant to be a claim based on some obligation beyond the terms of the 1868 treaty, then the Government submits that such a claim has never been previously presented.

Furthermore, if this second claim is based on some general obligation to provide adequate educational facilities, instructors and instruction, then to grant jurisdiction to the Court of Claims would be to give the court jurisdiction to entertain a claim that is not available to other Indian claimants. This was the holding in *Gila River Indian Community* v. *United States*, 190 Ct. Cl. 790, 801, 1970.

The third category of claims include allegations that the Government mismanaged the lands and resources of the Navajo Tribe. Claims for mismanagement of lands and resources are already being litigated in claim 7 of Docket No. 69, and in Docket Nos. 299 and 353.

In conclusion, it is the Department's position that enactment of S. 1613 would create confusion and prolong litigation on claims that are already before the Court of Claims.

Moreover, to the extent that these claims are included in claim 7, it should be pointed out that the United States has relied on the dismissal of claims 1 through 6 and 8 and has framed its litigation strategy accordingly.

Reopening these issues would not only duplicate prior litigation, it would undercut the Government's position. Consequently, we strongly believe that there is no justification whatsoever for enacting S. 1613.

Furthermore, enactment of this bill would be contrary to the policy stated in section 12 of the Indian Claims Commission Act, Act of August 13, 1946, 60 Stat. 1049, 1052, title 25, United States Code, section 70k, which provides that all tribal claims which arose prior to August 13, 1946, had to be filed within 5 years and that no claim not so presented "may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by Congress."

We have repeatedly stated that the erosion of this policy will lead to many applications for special jurisdictional acts to allow the litigation of forgotten claims and the relitigation of previously adjudicated claims.

We, therefore, urge the committee not to sanction the further erosion of this policy.

Mr. Chairman, that concludes my statement. I would be glad to answer any questions.

Thank you.

Senator GORTON. Thank you for that statement.

We do have a number of questions. Unfortunately, I cannot be here much longer, so we will submit these to you in writing.

We want to thank you.

Senator DECONCINI. Mr. Chairman, I have some questions also.

Senator GORTON. Please proceed, Senator DeConcini.

Senator DECONCINI. You state in your statement of claims that S. 1613 is entirely too broad and imprecise. Would you support deleting the description of the claims in the bill and inserting the list of the seven claims as given in the tribe's petition before the Indian Claims Commission in 1950?

Mr. LIOTTA. Senator, I might point out that, as it is stated here, we feel it is too broad for a number of reasons that I could give.

If the claims are set forth as they were in the original petition, then I would submit to you that that would put us still in the position of having to relitigate items that have already been litigated.

For example, insofar as Navajo Reservation lands were taken, which is item No. 1, I would point out to you that we paid for aboriginal titles in that case of $14.8 million.

In the context of that claim, as I understand it, there was an attempt to——

Senator DECONCINI. Is that the same case?

Mr. LIOTTA. Yes, that is the same case, as I understand it.

In the same case $14.8 million was paid for the aboriginal titles to certain lands. As I understand it, the evidence that was submitted did not prove recognized title in that particular case. That is when the attorney apparently withdrew that portion of the claim.

But in any event, it would put us in the position of having to go back again and go over the same problem.

Of course, as you know, a fifth amendment taking would come only with the recognized title portion and their evidence, as reported to me by my staff, indicates that they did not have evidence to support recognized title.

What that would do is to put us back before the Court of Claims again and going through that same issue. That would be a problem.

Furthermore, in their claim No. 7, which is presently before the court concerning general accounting for losses subsequent to the establishment of the reservation—in other words, they have claims presently pending, as I understand it, which take care of many of the items that they are talking about.

By reinstating those claims after counsel has withdrawn them, this would put us in a position of having to go through this entire proceeding again and reopening it again.

Senator DECONCINI. I will have an opportunity a little bit later to ask the tribal attorney whether or not they agree with you that is the same case. It is my understanding that it is not the same case.

You state that the Government's position is that the Navajo Tribe has not asserted any claim for the taking of reservation land in claims 1 through 6 and claim No. 8. Do you have a copy of the tribe's claims or are you familiar with them? If so, can you just describe what claims 1 and 2 assert?

Mr. LIOTTA. Senator, give us a few moments to look this over.

Senator DECONCINI. Certainly, go right ahead.

Mr. BEAL. My name is Richard Beal. I am the Section Chief of the Indian Claims Section in the Department of Justice.

The eighth claim purports to state a claim that the Navajo Indians were told by military officers that in return for their services in the war against the Apaches they would get land for their homeland to the east.

Senator DECONCINI. How about claims 1 and 2? They are the ones I am particularly interested in right now. Are you familiar with claims 1 and 2?

Mr. BEAL. My understanding of claim 1 is that it was a claim for the failure of the United States to honor the Treaty of Guadalupe

Hidalgo and that it was not a claim for title or for loss of title. It was a claim for the failure of the United States to honor the treaty.

In effect, it says that there was no recognition of the title even though they thought they were promised that.

Senator DECONCINI. You are right. That is part of the assertion.

The claim goes on and sets forth, at least, that they lost approximately 20,000 square miles of rich land which rightfully was the property of the petitioner.

The petitioner's people were there and confined to unproductive lands.

Mr. BEAL. It is my understanding, Senator, that in Docket No. 229, which was the aboriginal title claim, that the attorneys there proceeded to prove, with respect to this same acreage, that their title was aboriginal title.

In their findings and brief, they pursued and proved aboriginal title and took the position contrary to a position of recognized title.

Senator DECONCINI. You are saying that the Navajo did that?

Mr. BEAL. Yes; the Indian Claims Commission found that they owned aboriginally 17 million acres, approximately, and it was that 17 million acres that was involved in the settlement of Docket No. 229, where the Navajos received the $14.8 million.

Senator DECONCINI. So you are telling me that the 20,000 square miles alleged here was under that settlement?

Mr. BEAL. Yes, I believe it was.

Senator DECONCINI. Is that in the docket that you are making reference to?

Mr. BEAL. Docket 229?

Senator DECONCINI. Yes.

Mr. BEAL. Docket 229 is one for aboriginal title.

Senator DECONCINI. Does that refer to this claim here?

Mr. BEAL. I believe it does in that it covers exactly the same land.

Senator DECONCINI. I do not have access to Docket No. 229, but I would appreciate it if you could submit to us, for the committee record, your analysis of how Docket 229 covers this particular claim.

Maybe you are right. I am aware of that and that is what concerns me.

Mr. BEAL. Yes, I will be happy to do that.

Senator DECONCINI. Thank you.

Senator GORTON. Without objection, that will be placed in the record.

Mr. BEAL. I believe the way that was treated was as an alternative claim that they either had aboriginal title or they had recognized title and at trial it was concluded, apparently——

Senator DECONCINI. Your feeling is that that claim has already been satisfied by the aboriginal title set forth in No. 229?

Mr. BEAL. Right.

Senator DECONCINI. Let me ask you, Mr. Liotta, about this. You state:

> This claim for the nonfulfillment of article VI of the 1968 Treaty is currently being litigated under Claim 7 of Docket No. 69, in the Court of Claims.

I assume, then, that the administration supports including claim No. 4 dealing with the failure of the Government to provide education and schools as part of claim 7. Is that a fair understanding?

Mr. LIOTTA. I would say this. We have problems with an interpretation that dealing fairly and honorably with the tribe includes providing educational facilities, which is what you were referring to.

As I understand that, that seems to indicate some general fiduciary relationship not provided for in the treaty. Again, I would defer to Mr. Beal to go further into that, because as I understand it, this would be giving something over and above what is within the jurisdiction of the Court of Claims under the 1946 act, that is, some general fiduciary relationship.

Senator DECONCINI. Are you saying then that if there is a violation of the fiduciary relationship that the tribe should go to another forum?

Mr. LIOTTA. For the type of thing that we think it is, there is no jurisdiction under the Indian Claims Commission Act. I would defer to Mr. Beal to respond.

Senator DECONCINI. Do you concur with that?

Mr. BEAL. Yes, I do.

Senator DECONCINI. Has the administration taken a position previously as to what is included in claim No. 7, Mr. Beal?

Mr. BEAL. I am sure that we have taken a position in the past; yes.

Senator DECONCINI. What is that position?

Mr. BEAL. I cannot say right now.

Senator DECONCINI. Can you submit that to us?

Mr. BEAL. Yes.

Senator DECONCINI. Thank you.

Senator GORTON. Without objection, that also will be placed in the record.

[Subsequent to the hearing the following document was received for the record:]

DEPARTMENT OF JUSTICE,
Washington, D.C., December 27, 1981.

HON. DENNIS DECONCINI,
U.S. Senate,
Washington, D.C.

DEAR SENATOR DECONCINI: During the hearing of the Senate Committee on Indian Affairs on S. 1613 held on November 18, 1981, you asked that this Department answer three questions by letter.

The first was whether the Navajo's claim in Docket No. 229 covers Claims 1 and 2 in Docket No. 69. It is the Department's position that Claims 1 and 2 are alternative claims for compensation for the loss of the Navajo's aboriginally held "homelands" which were ceded by the Treaty of June 1, 1868, 15 Stat. 667. There was no claim made in claims 1 and 2 for "reservation", "treaty" or "recognized" title as now alleged by the Navajo Tribe. The Navajo Tribe has not cited one Treaty or Act of Congress as reflecting the intent of Congress to grant or acknowledge in the Navajos the right to permanently occupy a certain defined area of land as required by *United States* v. *Kiowa, Comanche and Apache Tribes*, 202 Ct. Cl. 29 (1973). In fact, Claim 1 of the Petition disclaims any such grant and alleges a failure or breach of the 1849 Treaty promise to designate, settle or adjust their territorial boundaries. See paragraph 8, 10(a) and 10(e) of Claim 1 of the Petition in Docket No. 69.

Even if the Navajo Tribe had asserted a recognized title claim to all or a portion of their aboriginal homelands in Claim 1, such a claim would be precluded by the results in Docket No. 229. In their requested findings of fact following trial in Docket No. 229, the Navajo Tribe requested the Indian Claims Commission to find that the Navajo Tribe held their homelands by aboriginal title up to the cession in the June 1, 1868 Treaty, *supra*, and the Commission so found. This finding precludes the possibility that the Navajo Tribe could have had recognized title. The finding is binding upon the United States, the Navajo Tribe and the Court of Claims.

The second question was to define what was included in Claim 7 in Docket No. 69. Claim 7 is an action for a general accounting of the Navajo Tribe's property and funds administered by the United States. In the words of the Court of Claims, *Navajo Tribe* v. *United States*, —— Ct. Cl. ——, 624 F.2d 981 (1980): "* * * true accounting claims, involving the disposition of tribal funds and property, have always been the warp and woof of Claim 7, and they remain so. If the issue is whether the Government, as fiduciary, faithfully managed or used Navajo assets, Claim 7 covers the question."

By order of the trial judge filed April 11, 1980 under Claim 7, in Docket No. 69, the Government was ordered to account to the Navajo Tribe for all uses or disposition of roads, rights-of-way, easements, coal, copper, uranium, vanadium, helium, sand, gravel, water, use of land for mining and exploration, timber, oil and gas, schools, administrative sites, prisoner of war camps, farms, storage areas, power sites, churches, missions, residences, trading posts, grazing, motion picture filming, parks, monuments, campsites and funds. The Government has accounted for some of these and is working on the accounting for others.

In addition the Government has filed accounting reports for the Navajo's Tribal Trust funds in Treasury, Tribal funds in individual Indian Money accounts, Tribal Organization funds and Treaty funds, including the Treaty of June 1, 1868.

Claim 7 thus includes all of Claim 3, all claims in Claim 4, based on the 1868 Treaty, all of Claim 5, and all of Claim 6.

The third question was whether the Department of Justice notified the Secretary of the Interior of the dismissal of Claims 1 through 6 and 8. We have searched our files and find no indication that the Department of Justice informed either the Department of the Interior or the Navajo Tribe that the Tribal Claims attorney intended to, or had dismissed Claims 1 through 6 and 8 in Docket No. 69.

Sincerely,

ANTHONY C. LIOTTA,
Deputy Assistant Attorney General,
Land and Natural Resources Division.

Senator DECONCINI. One thing that disturbs me is this. The contract that the tribe had with Attorney Mott required approval of the tribe and the Secretary of the Interior before any compromise or settlement by the attorney could be finalized.

Did the Justice Department inform either the tribe or the Secretary of the Interior that the attorney was proposing to withdraw these claims in 1969?

Mr. BEAL. I do not know. The Court of Claims has considered that question of the authority of the attorney to withdraw these claims.

Senator DECONCINI. I appreciate that statement, but it concerns me that the Justice Department had some duty to inform the tribe and the Secretary. I have yet to see anything in the record, unless you can produce something—and I am glad to have it—where that was done.

The tribe's position has been that they were never notified, and they have no documents and have been asked, under oath I believe, whether or not they have any such documents. I have yet to see any.

I wonder if the Justice Department can help us find out whether or not there was a compliance by attorney Mott? I fear there was not, but I am open to proof of another nature.

Mr. BEAL. I would be very surprised if the Department of Justice notified anyone about that. The Department of Justice in this litigation would be in an adversarial position to the Navajos and the Navajo's attorney.

I do not think that the Department of Justice would have a duty to the Navajos in this case to notify them of what their own attorney was doing.

Senator DECONCINI. Who would be responsible to notify the Secretary of the Interior?

Mr. BEAL. I should think it would be attorney Mott. If there was, in fact, some violation of his contract, then it was his responsibility.

Senator DECONCINI. I take it, then, that you would say that if notice was not given—and let us take that as a hypothetical—that any claim the Secretary would have ought to be against Mr. Mott for violation of his contractual relationship; right?

Mr. BEAL. If there was a violation of this contract, the claim would be against attorney Mott; yes.

Senator DECONCINI. And the litigation I have had, though your primary responsibility is to your own client, also when you are in a position as closely associated with other agencies of Government, I would think it would behoove you to advise them.

You do not take that kind of action today when you are representing more than one agency, even though they may have a private contract attorney? You would not advise them that you are dismissing or whatever?

Mr. BEAL. In litigation under the Indian Claim Commission Act, we probably would not notify the Interior.

Senator DECONCINI. And you do not do that today?

Mr. BEAL. That is true. If you are under 25 U.S.C. 1505, which is current litigation, where Interior is taking an active part in the litigation by giving litigation reports and such, then we would notify them.

Senator DECONCINI. Was the Interior Department taking an active part in these cases or, was it Mr. Mott only?

Mr. BEAL. It is very unlikely that the Department of the Interior was really taking an active role in the litigation.

Senator DECONCINI. In your last paragraph, Mr. Liotta, you indicated that the tribe failed to file its claim within 5 years of August 13, 1946.

When did the tribe file its claims?

Mr. LIOTTA. I think in my last paragraph I indicated what the law was. I assumed they filed within the 5 years. I am not indicating that they did not file claims within the 5 years after 1946.

Senator DECONCINI. Excuse me; go ahead.

Mr. LIOTTA. I am not indicating that this tribe did not file a claim within 5 years, but what I am saying is that generally there is a duty to file within 5 years.

What I am suggesting to you is that we recommend it not to open after that period of time and bring up new claims.

Senator DECONCINI [acting chairman]. We want to thank you very much.

Our next witness is Pete Riggs, senior member, Navajo Tribal Council of the Navajo Nation. He is accompanied by William C. Schaab.

STATEMENT OF PETE RIGGS, SENIOR MEMBER, NAVAJO TRIBAL COUNCIL, NAVAJO NATION, WINDOW ROCK, ARIZ., ACCOMPANIED BY: WILLIAM C. SCHAAB, ATTORNEY OF RECORD FOR THE NAVAJO TRIBE; ROBERT E. SALABYE, MEMBER, NAVAJO TRIBAL COUNCIL, BUDGET AND FINANCE COMMITTEE, AND COMMITTEE ON TRIBAL CLAIMS; PAUL D. BARBER, ATTORNEY FOR THE NAVAJO TRIBE; HARRY TOME, MEMBER, NAVAJO TRIBAL COUNSEL AND ADVISORY COMMITTEE OF NAVAJO TRIBAL COUNCIL, CHAIRMAN OF THE COMMITTEE ON TRIBAL CLAIMS; AND SARA W. BARLOW, ATTORNEY FOR THE NAVAJO TRIBE

Mr. SCHAAB. Thank you, Mr. Chairman.

Mr. Chairman, I first would like to introduce the other members of the Navajo delegation. On my left is Mr. Riggs, who will present the statement.

At the end is Robert Salabye, who is on the budget and finance committee of the Navajo Tribe, and on my right is Harry Tome, who is chairman of the claims committee for the tribe.

They are all members of the tribal council and on my far right is Mrs. Sara Barlow, who has been working on the cases, and Paul Barber, also associated.

Senator DECONCINI. Please proceed.

Mr. RIGGS. Mr. Chairman and honorable members of the committee, my name is Pete Riggs. I am the senior member of the Navajo Tribal Council where I have served since 1959.

I have been authorized to present this statement on behalf of the Navajo Nation by chairman Peter MacDonald and the committee on tribal claims chaired by Harry Tome.

I have attached to my statement copies of the tribal council's 1980 resolution asking Congress to pass the bill, and copies of resolutions of our Black Mesa and Forest Lake chapters asking for similar action.

I would ask that it be placed in the record.

Senator DECONCINI. Without objection, those will be inserted in the record at this point.

[The resolutions follow:]

CAP-33-80

Class "C" Resolution
No BIA Action Required.

RESOLUTION OF THE
NAVAJO TRIBAL COUNCIL

Requesting the United States Congress to Authorize the United States Court of Claims to Hear Certain Claims of the Navajo Nation Against the United States which were Wrongfully Withdrawn from Consideration by the United States Court of Claims by Wrongful Action of the Former Claims Counsel of the Navajo Nation, Harold Mott

WHEREAS:

1. The purpose of the Indian Claims Commission Act of 1946 was to provide a legal remedy to the Indian tribes of the United States which would permit them to make claims against the United States based upon the failure of the United States to fulfill its commitments as expressed in treaties and other action by the Federal Government; and

2. In 1950, former General Counsel Norman Littell filed the claims of the Navajo Nation against the United States before the then-existing Indian Claims Commission; and

3. Among these claims was a failure of the United States to provide education for the children of the Navajo Nation as provided for in the Treaty of 1868, as well as claims based on destruction of grazing land and timber land through a breach of the trust responsibility of the United States; and

4. In 1969, then Claims Counsel, Harold Mott, voluntarily withdrew seven claims of the Navajo Nation then pending before the Indian Claims Commission, without the approval of the Navajo Nation, the Navajo Tribal Council, or any official of the Navajo Nation Government; and

5. The United States Court of Claims has determined that this withdrawal is binding on the Navajo Tribe and the United States Supreme Court, on February 19, 1980, declined to review this decision of the United States Court of Claims; and

6. Without special federal legislation, the Navajo Nation will never be able to assert these claims against the United States, thus resulting in manifest injustice to the Navajo Nation, including the loss of some $400,000,000; and

7. Proposed legislation to permit litigation of this matter has been prepared by the Claims Counsel of the Navajo Nation and is annexed hereto as Exhibit "A"; and

8. It is only fair and just that the Congress permit the merits of the Navajo claim to be litigated rather than permitting Navajo rights under these claims to be foreclosed by the wrongful act of the former Claims Counsel of the Navajo Nation, Mr. Harold Mott.

NOW THEREFORE BE IT RESOLVED THAT:

1. The Navajo Tribal Council hereby urges the United States Congress to enact legislation which will confer jurisdiction on the Court of Claims to hear claims of the Navajo Nation which were wrongfully withdrawn from consideration by the Indian Claims Commission by the former Claims Counsel of the Navajo Nation, Harold Mott, as set forth in Exhibit "A" hereto.

2. The Navajo Tribal Council authorizes and directs the Chairman and Vice Chairman of the Navajo Tribal Council, the General Counsel to the Navajo Nation, and the Claims Counsel of the Navajo Nation to take all necessary action to secure approval of this proposed legislation by the United States Congress.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Tribal Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 62 in favor and 1 opposed, this 29th day of April, 1980.

Chairman
Navajo Tribal Council

RESOLUTION OF THE
PEOPLE OF THE BLACK MESA CHAPTER
THE NAVAJO NATION

Urging the United States Government to Properly Review Certain Claims of the Navajo Tribe as Vindicated by Treaties and Further Requesting the Claims Attorney to Seek Remedies on Behalf of the Navajo Tribe

WHEREAS:

1. The people of the Black Mesa Chapter within the former Joint Use Area are acutely aware of insensitive land dealing by the United States Government; and

2. In 1969, the former claims attorney of the Navajo Tribe filed a First Amended Petition that withdrew seven of the eight claims presented in Docket No. 69, which had been timely filed by the Tribe before the Indian Claims Commission in 1950.

3. The seven claims included some of the largest presented in the 1950 petition: the Government failed to provide education as required by the 1868 Treaty and standards of fair and honorable dealings, it has mismanaged timber, grazing lands and other reservation resources, and further it has taken reservation lands without payment.

4. Despite the Government's obligation to review and approve any adjustment of a claim before a dismissal or settlement could become final, the Government took no action whatsoever to prevent the unauthorized withdrawal of the claims when it learned of them in 1969. Instead, in shocking disregard of the Tribe's interests and of the Government's special duties to the Tribe, the Government repeatedly tried to take advantage of the unauthorized withdrawal by opposing reinstatement of the claims.

5. In 1975 the Indian Claims Commission permitted the present claims attorney to restate the withdrawn claims, but on June 13, 1979, the United States Court of Claims overturned the Commission's decision. That Court held that the Tribe was bound by its attorney's "voluntary dismissal" of the seven claims 10 years before and, since the claims had been dismissed, they could not be restored to the case in 1975. On February 19, 1980, the United States Supreme Court refused the Tribe's request to review the Court of Claims decision.

NOW, THEREFORE BE IT RESOLVED THAT:

1. The people of Black Mesa Chapter hereby urges the United States Government to properly review certain claims of the Navajo Tribe as vindicated by treaties.

2. The people of Black Mesa Chapter further requests the Claims Attorney to seek remedies on behalf of the Navajo Tribe.

CERTIFICATION

We hereby certify that the foregoing resolution was duly considered by the people of the Black Mesa Chapter at a duly called meeting held at Black Mesa, Navajo Nation (Arizona) at which a quorum was held and that same was passed by a vote of 31 in favor and 0 opposed this 15 day of March 1980.

Larry Bilto
Chapter President

Chapter Vice-President

Council Delegate
Black Mesa Chapter

Dorothy R. Yazzie
Chapter Secretary

RESOLUTION OF THE
PEOPLE OF THE FOREST LAKE CHAPTER
THE NAVAJO NATION

Urging the United States Government to Properly Review Certain Claims of the Navajo Tribe as Vindicated by Treaties and Further Requesting the Claims Attorney to Seek Remedies on Behalf of the Navajo Tribe

WHEREAS:

1. The people of the Forest Lake Chapter within the former Joint Use Area are acutely aware of insensitive land dealing by the United States Government; and

2. In 1969, a former claims attorney of the Navajo Tribe filed a First Amended Petition that withdrew seven of the eight claims presented in Docket No. 69, which had been timely filed by the Tribe before the Indian Claims Commission in 1950.

3. The seven claims included some of the largest presented in the 1950 petition: the Government failed to provide education as required by the 1868 Treaty and standards of fair and honorable dealings, it has mismanaged timber, grazing lands and other reservation resources, and further it has taken reservation lands without payment.

4. Despite the Government's obligation to review and approve any adjustment of a claim before a dismissal or settlement could become final, the Government took no action whatsoever to prevent the unauthorized withdrawal of the claims when it learned of them in 1969. Instead, in shocking disregard of the Tribe's interests and of the Government's special duties to the Tribe, the Government repeatedly tried to take advantage of the Unauthorized withdrawal by opposing reinstatement of the claims.

5. In 1975 the Indian Claims Commission permitted the present claims attorney to restate the withdrawn claims, but on June 13, 1979, the United States Court of Claims overturned the Commission's decision. That Court held that the Tribe was bound by its attorney's "voluntary dismissal" of the seven claims 10 years before and, since the claims had been dismissed, they could not be restored to the case in 1975. On February 19, 1980, the United States Supreme Court refused the Tribe's request to review the Court of Claims decision.

NOW, THEREFORE BE IT RESOLVED THAT:

1. The people of Forest Lake Chapter hereby urges the United States Government to properly review certain claims of the Navajo Tribe as vindicated by treaties.

2. The people of Forest Lake Chapter further requests the Claims Attorney to seek remedies on behalf of the Navajo Tribe.

CERTIFICATION

We hereby certify that the foregoing resolution was duly considered by the people of the Forest Lake Chapter at a duly called meeting held at Forest Lake, Navajo Nation (Arizona) at which a quorum was held and that same was passed by a vote of 30 in favor and 0 opposed this 16 day of March, 1980.

Chapter President

Chapter Vice President

Council Delegate
Forest Lake Chapter

Chapter Secretary

Mr. RIGGS. The Navajo people are asking Congress to correct the failure of the United States, as our trustee, to protect our right to obtain a fair hearing on our claims that were properly filed under the Indian Claims Commission Act more than 30 years ago.

These claims involve two subjects of vital concern to Navajos. First and above all, the Government's failure to keep its historic promises to give Navajo children the opportunity for an education, and second, the Government's mismanagement of Navajo lands and their resources during the past 100 years.

When I was growing up, most Navajo children did not go to school because there were only a few schools and they were overflowing. Even fewer Navajos in my parent's generation had schools to attend.

That is true in spite of the Government's promises, starting as far back as 1868, to provide teachers and schoolhouses for all Navajo children.

Lacking an education, we could only look to the Government as our trustee, to manage our resources, but the trustee made many mistakes over the years. When Congress in 1946, for the first time, gave the Navajos the right to bring these wrongs before the Indian Claims Commission, we did so.

Maybe, we thought, some good will come of these claims, and we will be able to educate ourselves. In fact, our first completed claims case brought in some money and we put all of it in a fund for scholarships and other educational uses.

The investments were made under the plan published at 40 F.R. 5936, December 23, 1975.

Unfortunately, that fund is only a drop in the bucket in comparison to the needs. The great bulk of our people still live in poverty, in the remote desert, without local schools and with nothing but rough dirt trails for busing to distant schools.

Navajo children still actually freeze to death out there from time to time trying to get home from school.

Now it seems that the right to a full hearing granted us by Congress 35 years ago, and the hope for some compensation to help undo past wrongs, has been taken away by new wrongs.

Our education and resource claims have been thrown out on a technicality in a way that neither Congress nor the tribe ever intended.

In 1969, without tribal approval or consent, the second claims attorney for the tribe filed an amended petition in one of the cases, Docket No. 69, which deleted seven paragraphs, and "withdrew" Claims 1–6 and Claim 8, including our education and resource management claims.

I refer here to page 57a of exhibit A to my statement, and ask that exhibit A be placed in the record. [See p. 101.]

Senator DECONCINI. Without objection, that will be inserted in the record at this point.

[Exhibit A follows. Testimony resumes on p. 117.]

19

EXHIBIT A

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. ——

THE NAVAJO TRIBE, *Petitioner*,

v.

THE UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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November 9, 1979

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	9
1. Jurisdiction Misconstrued; Special Claims Contract Ignored; Conflict with Established Precedents	10
2. Misinterpretation of Amended Petition	15
3. Unwarranted Emasculation of Seventh Claim	19
CONCLUSION	23
APPENDIX A (Opinion of the Court of Claims, June 13, 1979)	1a
APPENDIX B (Order of the Court of Claims, September 28, 1979)	9a
APPENDIX C (Petition, No. 69, filed July 11, 1950)	11a
APPENDIX D (Special Claims Contract, July 1, 1968)	51a
APPENDIX E (First Amended Petition, No. 69, filed October 1, 1969)	57a
APPENDIX F (Opinion of the Indian Claims Commission, January 23, 1975)	59a
APPENDIX G (Opinion of the Trial Judge, January 23, 1978)	65a

Cases: Page

Green v. Menominee Tribe, 233 U.S. 558 (1914) 14

Holker v. Parker, 11 U.S. (7 Cranch) 436 (1813) 13

In re Sanborn, 148 U.S. 222 (1893) 11

McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973) 18

Marlin v. Lewallen, 276 U.S. 58 (1928) 18

Menominee Tribe v. United States, 391 U.S. 404 (1968). 18

Navajo Tribe v. United States, —— Ct. Cl. ——, 601 F.2d 536 (1979) 1, 9

Navajo Tribe v. United States, Ct. Cl. No. 69 (Claims 1 through 6 and 8), Order of September 28, 1979 ... 2, 8

Navajo Tribe v. United States, 31 Ind. Cl. Comm. 40 (1973) 7, 17

Navajo Tribe v. United States, 34 Ind. Cl. Comm. 432 (1974) 8

Navajo Tribe v. United States, 35 Ind. Cl. Comm. 305 (1975) 8, 11, 15

Navajo Tribe v. United States, 36 Ind. Cl. Comm. 215 (1975) 8

Pueblo of Santa Rosa v. Fall, 273 U.S. 315 (1927) ... 14

Santa Rosa Band v. Kings County, 532 F.2d 655 (9th Cir. 1975) 18

Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956) .. 20

Seminole Nation v. United States, 316 U.S. 286 (1942) .. 18

Sioux Tribe v. United States, 146 F.Supp. 229 (1956), vacated, 182 Ct. Cl. 912 (1968) 14

Snoqualmie Tribe v. United States, 178 Ct. Cl. 570, 372 F.2d 951 (1967) 21

Thomas v. Colorado Trust Deed Funds, Inc., 366 F.2d 136 (10th Cir. 1966) 13

Udall v. Littell, 366 F.2d 668 (D.C. Cir. 1966) 6

United States v. Beebe, 180 U.S. 343 (1901) 13

Citations Continued iii

Page

United States v. Ft. Sill Apache Tribe, 209 Ct. Cl. 433, 533 F.2d 531 (1976) 20

United States v. Kagama, 118 U.S. 375 (1886) 18

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 18

STATUTES:

U.S. CONSTITUTION, amend. V 2

Indian Reorganization Act of 1934, § 16, 25 U.S.C. 476 4

Indian Claims Commission Act of 1946:

as amended, 25 U.S.C. § 70 *et seq.* 3

§ 12, 25 U.S.C. § 70k 9, 21

§ 15, 25 U.S.C. § 70n 3-4, 10, 14, 19

25 U.S.C. §§ 81-84 ..... 4, 10, 11, 19

28 U.S.C. § 1255 2

Pub. L. No. 94-465, 90 Stat. 1990 (1976) 8

RULES:

FED. R. CIV. P. 54(b) 20

GEN. R. P. OF IND. CL. COMM.:

7(a) 16, 20

13(a)(1) 17

MISCELLANEOUS:

RESTATEMENT OF JUDGMENTS (1942) 21

34 OP. ATT'Y GEN. 439 (1925) 18-19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. ——

THE NAVAJO TRIBE, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Navajo Tribe petitions for a writ of certiorari to review the Opinion of the United States Court of Claims dated June 13, 1979, and the Order entered on petitioner's motion for clarification of that Opinion.

OPINIONS BELOW

This case involves the arbitrary dismissal of valuable claims against the United States in derogation of safeguards mandated by Congress for the protection of tribal claimants under the Indian Claims Commission Act. The Opinion of the Court of Claims (Appendix A) is reported at 601 F.2d 536 (1979). The Order (Appendix B) is unreported.

JURISDICTION

The Opinion below was entered on June 13, 1979. Petitioner filed a motion for clarification of the Opinion on September 4, 1979, and on September 11, 1979, the Chief Justice extended the time for filing this petition to November 10, 1979 (No. A-206). The Order on the motion for clarification was entered on September 28, 1979. The Court's jurisdiction is based upon 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims misconstrued its jurisdiction under the Indian Claims Commission Act to bar seven counts of an eight-count petition after their unauthorized "withdrawal" by petitioner's claims attorney in violation of his attorney's contract, which required prior approval by the Tribe and the Secretary of the Interior of any compromise, settlement or adjustment of a claim.

2. Whether the "withdrawal" of seven counts of an eight-count petition affects jurisdiction over claims stated by the remaining count, by barring all issues that may also have been presented by the "withdrawn claims."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The provision of the United States Constitution involved is the Fifth Amendment, which provides in relevant part as follows:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; . . .

Congress mandated safeguards for tribal claimants under Section 15 [25 U.S.C. § 70n] of the Indian Claims Commission Act of August 13, 1946, c. 959, P.L. 79-726, 60 Stat. 1049, 1053, (the "Act"), which reads as follows:

> "§ 70n. Attorneys of claimants; selection, practice and fees; Attorney General to represent United States; compromise of claims.
>
> "Each such tribe, band, or other identifiable group of Indians may retain to represent its interests in the presentation of claims before the Commission an attorney or attorneys at law, of its own selection, whose practice before the Commission shall be regulated by its adopted procedure. The fees of such attorney or attorneys for all services rendered in prosecuting the claim in question, whether before the Commission or otherwise, shall, unless the amount of such fees is stipulated in the approved contract between the attorney or attorneys and the claimant, be fixed by the Commission at such amount as the Commission, in accordance with standards obtaining for prosecuting similar contingent claims in courts of law, finds to be adequate compensation for services rendered and results obtained, considering the contingent nature of the case, plus all reasonable expenses incurred in the prosecution of the claim; but the amount so fixed by the Commission, exclusive of reimbursements for actual expenses, shall not exceed 10 per centum of the amount recovered in any case. The attorney or attorneys for any such tribe, band, or group as shall have been organized pursuant to section 476 of this title, shall be selected pursuant to the constitution and by-laws of such tribe, band or group. The employment of attorneys for all other claimants shall be subject to the provisions of sections 81, 82, 83 and 84 of this title.

> "The Attorney General or his assistants shall represent the United States in all claims presented to the Commission, and shall have authority, with the approval of the Commission, to compromise any claim presented to the Commission. Any such compromise shall be submitted by the Commission to the Congress as part of its report as provided in section 70t of this title in the same manner as final determinations of the Commission, and shall be subject to the provisions of section 70u of this title."

Petitioner is not organized under the Indian Reorganization Act, 25 U.S.C. § 476; therefore, its contract with its claims attorney is required to be approved by the Secretary of the Interior under 25 U.S.C. §§ 81 to 84. Section 81 provides in pertinent part:

> "No agreement shall be made by any person with any tribe of Indians, . . . for the payment or delivery of any money or other thing of value . . . in consideration of services for said Indians relative to their lands, or to any claims . . . in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:
>
> First. Such agreement shall be in writing, and a duplicate of it delivered to each party.
>
> Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it. . . ."

The Secretary required in the attorney contract that any compromise, settlement, or other adjustment of petitioner's claims be approved by his delegate and the Tribe.

STATEMENT OF THE CASE

Petitioner is by far the largest Indian tribe in the nation, with a population of approximately 150,000 or about one-fourth of the total American Indian population, and a reservation of 13 million acres encompassing lands in the states of Arizona, New Mexico and Utah. The magnitude and complexity of the Tribe's claims against the United States, as well as of its general legal problems, are commensurate with its extraordinary size. The claims dismissed by the decision below have been appraised by petitioner's expert witnesses well in excess of a hundred million dollars.

Petitioner timely filed its Petition under the Indian Claims Commission Act on July 11, 1950, as Docket No. 69 (Appendix C). The Petition contained eight counts or "claims" consisting of 29 numbered paragraphs plus a general prayer for relief in paragraph 30. Each count incorporated by reference the factual allegations of the preceding counts. Claims 1 through 6 and Claim 8 alleged specific breaches of treaties or fiduciary obligations by the United States and sought damages for the alleged breaches. Claim 7 alleged a trust or guardian-ward relationship between the Government and the Navajo Tribe and demanded a complete accounting of the Government's handling of tribal property and money which it held in trust. To the extent that the accounting sought in Claim 7 would reveal breaches of treaty or fiduciary duties that were specifically alleged in Claims 1 through 6 and Claim 8, Claim 7 presented an alternative theory for relief, *i.e.*, a suit for an accounting instead of an action for money damages.

Respondent never answered the Petition. On August 8, 10 and 11, 1951, petitioner timely filed petitions

docketed, respectively, as Nos. 229 (land claim), 299 and 353 (receipts accounting for certain resources), which reiterated some of the allegations of the Petition in No. 69. Because of the magnitude and complexity of the claims, petitioner's first claims counsel, Normal Littell, entered a stipulation with the Government providing that prosecution of claims in Nos. 69, 299 and 353 would be deferred pending completion of the land claim in No. 229.

In 1966, after lengthy litigation culminating in a decision of the United States Court of Appeals for the District of Columbia Circuit upholding the Secretary's supervisory power over tribal attorneys' contracts, Mr. Littell was fired from his position as general counsel for the Tribe by the Secretary of the Interior. *Udall* v. *Littell,* 366 F.2d 668 (D.C. Cir. 1966). Mr. Littell resigned as claims attorney shortly thereafter, on February 20, 1967. His successor, Harold Mott, also was permitted to assume the dual role of petitioner's general counsel and, by separate contract, claims counsel. His claims contract was approved by the Secretary of Interior on November 21, 1968. Section 6 of that contract (Appendix D) required that:

> "[a]ny compromise, settlement or other adjustment of a claim of the Tribe shall be subject to the approval of the TRIBE and the SECRETARY [of the Interior]." Appendix D at 5.

During the hiatus after respondent fired petitioner's first claims attorney, but before it approved the second, respondent filed (on November 14, 1967) in No. 69 a "Motion to Require Petitioner to Set Out in Separately Numbered Petitions the Claims Pleaded in the Original Petition or, in the Alternative, to Dismiss

the Petition." A response to that motion was not filed because petitioner had no attorney of record, and respondent then moved (on March 11, 1968) to dismiss the Petition for failure to prosecute. After approval of his contract, petitioner's second claims attorney responded (on December 13, 1968) to the latter motion, requesting an extension of time to respond to the earlier motion. On December 23, 1968, the Commission denied the motion to dismiss and gave petitioner nine months "to amend the petition" in No. 69.

On October 1, 1969, petitioner's claims attorney filed a First Amended Petition in No. 69 (Appendix E), as follows:

> "The petition is amended by deleting paragraphs 10, 16, 19, 21, 23, 25 and 29, thereby withdrawing from consideration herein the first, second, third, fourth, fifth, sixth and eighth claims."

The deleted paragraphs comprised particular allegations of damages; none of the allegations of fact was deleted, nor was the general prayer for relief at paragraph 30. The withdrawal of "claims" was not approved by petitioner or by the Secretary of the Interior. Respondent filed its Answer to First Amended Petition on November 4, 1969, but it did not seek entry of a final judgment dismissing the seven "withdrawn" claims; and the claims were never actually dismissed before the Opinion below.

On July 25, 1973, the Commission consolidated No. 69 with Nos. 299 and 353 because "plaintiff's allegations in Docket Nos. 299 and 353 clearly overlapped those filed in Docket No. 69." 31 Ind. Cl. Comm. 40, 41-42. On respondent's motion for rehearing (raising

other issues), the Commission confirmed the consolidation in its 1973 Opinion, 34 Ind. Cl. Comm. 432 (1974).

Petitioner's second claims attorney's contract expired on June 30, 1972, and after another hiatus its third and present claims attorney entered his appearance on September 21, 1973. 34 Ind. Cl. Comm. 432, 433.

Petitioner moved on July 1, 1974, to amend the First Amended Petition in No. 69 by restating the withdrawn paragraphs of the first six claims. Respondent's response to that motion on July 18 for the first time asked for entry of final judgment dismissing the first six and eighth claims. The Commission granted petitioner's motion to "reformulate" the first six claims in No. 69 and denied respondent's motion for final judgment. Opinion dated January 23, 1975, 35 Ind. Cl. Comm. 305 (Appendix F). That opinion ordered that the consolidated dockets be separated into two separate dockets, the first denominated No. 69 (Claims 1 through 6 and Claim 8), and the second Nos. 69, 299 and 353 (Accounting Claims), which included the seventh claim in No. 69. Respondent's motion to certify the Commission's action to the Court of Claims was denied on July 9, 1975, 36 Ind. Cl. Comm. 215.

Respondent then filed (on June 3, 1976) a motion to dismiss or for more definite statement addressed to the Second Amended Petition in No. 69 (Claims 1 through 6 and Claim 8), which remained undecided when the docket was transferred to the Court of Claims pursuant to P.L. 94-465, 90 Stat. 1990 (1976) [providing for termination of the Commission at September 30, 1978]. The Trial Judge to whom the matter was assigned held in his Opinion of January 23, 1978, that the motion was an untimely motion for rehearing but denied it on the

merits insofar as it challenged the reformulation of Claims 1 through 6. (The first 12 pages of the Trial Judge's Opinion are annexed as Appendix G.)

On review, the Court of Claims on June 13, 1979, rejected the Trial Judge's Opinion and dismissed Claims 1 through 6 and Claim 8 (Appendix A). The Court of Claims held that the contractual requirement for Tribal and Secretarial authorization of adjustments in claims did not apply to the complete withdrawal of claims, and that the unauthorized withdrawal of claims which were never actually dismissed nonetheless created a jurisdictional bar to consideration of those claims on their merits.

Questions raised during a conference with the Trial Judge pertaining to proceedings in Dockets 69, 299 and 353 (Accounting Claims, including Claim 7) led the Trial Judge to advise petitioner to seek clarification of the Court's Opinion of June 13, 1979. Accordingly, petitioner asked the Court (on September 4, 1979) to clarify whether issues presented by the allegations preserved in the seventh claim were affected by the dismissal of the first six claims.[1] By Order of September 28, 1979, the Court held that such dismissal "precluded plaintiff from subsequently reasserting those claims" as issues of the seventh claim.

REASONS FOR GRANTING THE WRIT

The Court of Claims below misconstrued its jurisdiction under the Indian Claims Commission Act, 25 U.S.C. § 70k, by dismissing before trial Claims 1 through 6 of the original Petition and thereafter con-

[1] Claim 8 was not reformulated and is of no relevance in this proceeding.

struing that dismissal as precluding adjudication of issues in Claim 7 that were never dismissed by the petitioner. The Court failed to give effect to explicit safeguards in the Special Claims Contract between petitioner and its attorney prescribed by the Secretary of the Interior under 25 U.S.C. § 81 for the protection of the Tribe. That failure violates the mandate of Section 15 of the Indian Claims Commission Act for protection of tribal interests in the adjudication process. The Court also ignored long-established precedents of this Court and of the Circuit Courts requiring clear authority before an attorney's dismissal of claims against his client's interest can be given effect. Moreover, the Court erroneously construed the intent and effect of the First Amended Petition, guillotining valuable tribal claims before trial when such a result was not intended or approved by petitioner, thus depriving petitioner of due process of law. Finally, the Court reached beyond the matters raised by respondent's motion to dismiss Claims 1 through 6 and Claim 8 and arbitrarily stripped from Claim 7 in a wholly separate docket all issues that may be found within the first six claims. That action not only deprived petitioner of due process of law in the accounting docket but creates such uncertainty that orderly adjudication of its accounting claims may become impossible. Each of these reasons is discussed briefly below.

1. Jurisdiction Misconstrued; Special Claims Contract Ignored; Conflict with Established Precedents.

In Section 15 of the Indian Claims Commission Act, 25 U.S.C. § 70n, Congress allowed each tribe to choose its claims attorney, but it carefully safeguarded the tribe by requiring the Secretary of the Interior to

approve the attorney's contract under 25 U.S.C. § 81. That 1871 statute was "intended to protect the Indians from improvident and unconscionable contracts." *In re Sanborn,* 148 U.S. 222, 227 (1893). As the note (by a member of the Commission's staff) annexed to the Special Claims Contract states (Appendix D), the Secretary rejected the first version of the contract and required certain amendments for the Tribe's protection.

Section 6 of the Special Claims Contract stated:

> "6. *Compromises and Settlements.* Any compromise, settlement or other adjustment of the claims shall be subject to the approval of the TRIBE and the SECRETARY."

The First Amended Petition did not have the required approvals.

The Indian Claims Commission, upon the Tribe's motion to reinstate the claims which its prior attorney had purported to withdraw, found that he lacked authority to withdraw the claims. It is also clear that the United States, in its supervisory capacity over this attorney's contract knew of his lack of authority. The Commission stated, 35 Ind. Cl. Comm. 305, 307, fn. 2 (Appendix F):

> "The attorney contract in effect with the Navajo Tribe at the time of the amended petition of 1969 required that any adjustment of plaintiff's claims by plaintiff's attorneys would be subject to the approval of the tribe. The record does not indicate that this requirement, which would presumably be applicable to an amendment withdrawing several claims, was met."

The Commission, therefore, allowed the Claims to be reinstated in the form of a Second Amended Petition.

The Trial Judge also treated "voluntary withdrawal" of previously pleaded claims as an adjustment of the Tribe's claims requiring approval in accordance with the contract [Appendix G].

However, the Court of Claims construed Section 6 of the Contract

> " . . . as requiring tribal and secretarial approval only of compromises, settlements, and similar adjustments of claims, *i.e.*, the termination of claims in return for some consideration given in exchange therefor. Paragraph 6 did not limit the attorney's authority to withdraw certain claims, *several of which probably were duplicative of those in other dockets, for what he perceived to be sound tactical or strategic reasons.* That was precisely the kind of decision the attorney would have to make in carrying out his duty under paragraph 2 of the contract 'to diligently prosecute the claims and to exert his best efforts to satisfactorily conclude them within the term of this contract.' Indeed, an attorney could not effectively conduct such a major Indian claims case as this if he had to obtain the prior approval of his client and the Secretary before he could take such action." [App. A; italics added.]

That construction is absurd. There is no basis whatsoever for the Court's italicized speculation that the claims were withdrawn because they were duplicated in other dockets and their withdrawal in No. 69 would achieve some advantage for the petitioner.

The Court's conclusion that the attorney had authority to dismiss the petitioner's multi-million dollar claims ignored long-established precedents of this Court and of the Circuit Courts requiring clear evidence of an attorney's authority to dismiss valuable

claims against his client's interest. In *Holker v. Parker*, 11 U.S. (7 Cranch) 436, 452-453 (1813), Chief Justice Marshall explained:

> "... Has the attorney a right to make such a compromise?
>
> "Although an attorney at law, merely as such, has, strictly speaking, no right to make a compromise; yet a court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed on, or not fairly exercised in the case. But where the sacrifice is such as to leave it scarcely possible that, with a full knowledge of every circumstance, such a compromise could be fairly made, *there can be no hesitation in saying that the compromise, being unauthorized and being therefore in itself void, ought not to bind the injured party.* Though it may assume the form of an award or of a judgment at law, the injured party, if his own conduct has been perfectly blameless, ought to be relieved against it. This opinion is the more reasonable because it is scarcely possible that, in such a case, the opposite party can be ignorant of the unfair advantage he is gaining." [Italics added]

See also *United States v. Beebe*, 180 U.S. 343 (1901); *Thomas v. Colorado Trust Deed Funds, Inc.*, 366 F.2d 136 (10th Cir. 1966).

That fundamental principle must be applied with greater care where an Indian tribe is involved and its attorney's contract expressly denies authority to dismiss claims without double approval. If the attorney's withdrawal of claims was intended as a dismissal of the claims with prejudice, the safeguards of paragraph 6 of the Special Claims Contract were clearly necessary.

For such a broadscale dismissal deprived petitioner of its right to a complete adjudication under the Act of the valuable claims framed in its timely Petition. There was no conceivable "tactical or strategic" reason for such an action; an attorney who would finally abandon such claims would be patently incompetent. Section 6 was required by the Secretary precisely to protect petitioner from such an eventuality.

The Court's recognition that Section 6 required both tribal and secretarial approval for a "termination of claims in return for some consideration given in exchange therefor" is shockingly inconsistent with its conclusion that these valuable claims could be terminated without such approval *because* the Tribe received nothing in exchange. Had the Government paid a peppercorn for termination of these same claims, the attorney's consent would have been void without the required double approval. Cf. *Pueblo of Santa Rosa v. Fall*, 273 U.S. 315, 320 (1927); *Green v. Menominee Tribe*, 233 U.S. 558, 570-571 (1912). Surely, Congress' insistence on basic safeguards of tribal interests in claims litigation demands that the Contract's requirements be met when valuable claims are abandoned without any consideration whatever.

When in 1968 the Court of Claims was confronted with the results of incompetent representation of the Sioux Tribe in a claims case, it took the extraordinary step of vacating its 1956 affirmance of a Commission decision against the Tribe after trial on the merits and remanded to the Commission for reopening of proof. *Sioux Tribe v. U.S.*, 146 F.Supp. 229 (1956), *vacated*, 182 Ct. Cl. 912 (1968). How different was its summary disposition of these valuable Navajo claims, where Section 15 of the Act and Section 6 of petitioner's Spe-

cial Claims Contract required specific action to prevent manifest injustice to the petitioner through the incompetence of its attorney.

If the Court of Claims was right in viewing the withdrawal as a voluntary dismissal of these claims, the First Amended Petition must be treated as a wholly unauthorized "adjustment" of the claims and of no legal effect.

2. Misinterpretation of Amended Petition.

The First Amended Petition in No. 69 did not in terms state that petitioner was voluntarily dismissing seven of the eight claims in its original Petition. That effect was arbitrarily attributed to the amendment by the Court of Claims; it is inconsistent with its language and with its intention. The Court admitted that the amendment was "not in form, a voluntary dismissal of the plaintiff's nonaccounting claims in Docket No. 69." [Part III of Opinion; App. A.] However, the Court had no reason nor basis in the record to construe the language of the amendment—deleting the specific paragraphs that characterized each "claim" and "withdrawing [those claims] from consideration herein"—as a voluntary dismissal of several causes of action. The Commission had correctly interpreted the amendment according to its plain terms:

> "... plaintiff's first amended petition, which purported to withdraw seven of plaintiff's claims, did not delete the allegations of fact which were the substance of those claims. Moreover, plaintiff's seventh claim, which clearly remained after the amended petition of 1969 was filed, stated that plaintiff 'restates and reaffirms each and every allegation of fact' of the original petition." 35 Ind. Cl. Comm. 305, 307 (Appendix F).

The "claims" withdrawn were merely the general allegations of damages in the deleted paragraphs; the causes of action defined by the factual allegations of the other paragraphs and the general prayer for relief were intentionally left unaffected. The amendment was thus intended to be a restructuring of the Petition, not a dismissal of causes of action, in response to respondent's motion of November 14, 1967 that demanded "separately numbered Petitions of the claims pleaded in the original Petition."

Moreover, a reorganization of the original pleading was fully authorized by the Commission's Rules, which did not require separate "petitions" for each "claim." Rule 7(a) stated:

> SEC. 7. *General rules of pleading.*
>
> (a) *Pleading to be concise and direct; consistency.* (1) Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.
>
> (2) *A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses.* When two or more statements are made in the alternative and one of them, if made independently, would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has, regardless of consistency and regardless of the nature of the grounds on which they are based. All statements shall be made sub-

> ject to the obligations set forth in Sec. 10(b) [requiring the attorney to believe "good ground" supports the pleading]. [Italics added]

The First Amended Petition, submitted before answer under Rule 13(a)(1) which allowed the restructuring of claims as a matter of course, combined eight separate claims into one.

As long as the factual allegations of the Petition remained, it was incorrect to construe the amendment as a voluntary dismissal of any claims covered by those allegations, by the damages paragraph (¶ 27) of the seventh claim, and by the general prayer for relief in paragraph 30. The Court's arbitrary refusal to consider the plain language of the Petition remaining after the amendment is clear in footnote 3 to the Opinion (App. A):

> The plaintiff challenges characterization of the issue as jurisdictional. It argues that, since it withdrew only the prayers for relief and not the claims themselves, those claims were "subsumed" under the comprehensive prayer for relief of paragraph 30 and under claim 7's incorporation of preceding factual allegations. As noted above, however, the withdrawn paragraphs were not merely prayers for relief, and *claim 7 incorporated only general recitations of fact.* Moreover, the Commission recognized that the claims in question were withdrawn, not subsumed in the surviving claim. *Navajo Tribe v. United States,* 31 Ind. Cl. Comm. 40, 41 (1973). [Italics added.]

The "general recitations of fact" incorporated in Claim 7 comprise the causes of action (*i.e.*, the facts entitling plaintiff to the relief sought in paragraph 30) pleaded by the original timely Petition, and the Com-

mission's 1975 Opinion (quoted above) so held, rejecting its 1973 reference to "withdrawn" claims cited by the Court.

The word "claims" in the First Amended Petition is ambiguous: It is not clear whether it refers merely to the allegations of damages in the deleted paragraphs or, more broadly, to all causes of action presented by the preceding factual allegations. The Court arbitrarily seized upon the broader interpretation, contrary to the long-established rule that Indian tribes must receive the benefit of any doubt on questions of intent or in the interpretation of documents affecting their interests. *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 552-558 (1832); *United States v. Kagama,* 118 U.S. 375, 383-384 (1886); *Marlin v. Lewallen,* 276 U.S. 58, 64 (1928); *Seminole Nation v. United States,* 316 U.S. 286, 297 (1942); *McClanahan v. Arizona State Tax Com'n,* 411 U.S. 164, 174-175 (1973); *Menominee Tribe v. United States,* 391 U.S. 404 (1968). In *Santa Rosa Band v. Kings County,* 532 F.2d 655, 660 (9th Cir. 1975), the Court said:

> "This principle is somewhat more than a canon of construction akin to a Latin maxim, easily invoked and as easily disregarded. It is an interpretative device, early framed by John Marshall's legal conscience for ensuring the discharge of the nation's obligations to the conquered Indian tribes."

The principle was recognized by the Attorney General in 34 Op. Atty. Gen. 439, 444 (1925):

> "From the beginning of its negotiations with the Indians, the Government has adopted the policy of giving them the benefit of the doubt as to questions of fact or the construction of treaties and statutes

relating to their welfare. An illustration of this is found in section 2126 of the Revised Statutes (Act of June 30, 1834, 4 Stat. 733) [25 U.S.C. § 194], which provides:

> 'In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.'

This practice of safeguarding the Indian has been continuously adhered to. Treaties have been considered, not according to their technical meaning, but in the sense in which they would be naturally understood by the Indians."

That principle was mandated by Section 6 of Special Claims Contract and Congress' establishment of protection for tribal claimants under Section 15 of the Act and 25 U.S.C. § 81. The Court of Claims' arbitrary refusal to apply it amply justifies issuance of the writ.

3. Unwarranted Emasculation of Seventh Claim.

The Order entered on petitioner's Motion for Clarification (and footnote 3 of the Opinion) precludes trial of any "claims" withdrawn in No. 69 unless they were pleaded in Nos. 229, 299, or 353. The unwithdrawn seventh claim in No. 69, which has been consolidated with Nos. 299 and 353 since the Commission's Order of July 25, 1973, is thus stripped of a large portion of its well-pleaded issues. The allegations of the Seventh Claim, which were not deleted by the First Amended Petition, include all of the factual allegations of the first six claims, as the Commission held. Yet the Court

of Claims held that the withdrawal of the first six "claims" jurisdictionally bars their adjudication as surviving elements of the seventh claim. That unsupportable holding is wholly arbitrary and capricious.

The Commission's Rule 7 expressly permitted petitioner to plead multiple claims or counts in a single petition. Under Rule 54(b) of the Federal Rules of Civil Procedure voluntary withdrawal or dismissal of one or more multiple claims has no effect on the remaining claims. *Sears, Roebuck & Co. v. Mackey,* 351 U.S. 427, 431 (1956). The Commission's Rule 7 indicated that those elementary principles of due process were applicable in practice before the Commission, and the Court of Claims was bound thereby.

Furthermore, the Court's ruling that allegations of Claims 1 through 6 which overlap those of Claim 7 are barred from Claim 7 was made in a docket separate from the docket of Claim 7. The Court's ruling was made in "Docket No. 69 (Claims 1 through 6 and Claim 8)" as established by the Commission on January 23, 1975 (App. D, p. 310). The seventh claim was not part of that docket but was separately consolidated by the Commission on July 25, 1973, as "Nos. 69, 299 and 353 (Accounting Claims)." (The Commission's discretion to consolidate or separate claims was confirmed in *United States v. Ft. Sill Apache Tribe,* 209 Ct. Cl. 433, 533 F.2d 531 (1976)). In the Order of September 28, the panel of judges in "Docket No. 69 (Claims 1 through 6 and Claim 8)" ruled, in effect, that its June 13 Opinion would be *res judicata* as to claims or issues pleaded in "Docket Nos. 69, 299 and 353 (Accounting Claims)." Under established practice, the panel in the Accounting Claims docket would decide whether *res*

judicata in fact constituted a defense to claims well-pleaded therein. The September 28 Order apparently deprives that panel of its normal authority.

The Court's Order was thus a clear misapplication of the principles of *res judicata*. Without doubt, *res judicata* is a defense which must be pleaded in the case following the adjudication (here Docket Nos. 69, 299 and 353 (Accounting Claims)), and the Court must determine whether the elements of that defense are in fact present. One of those elements, prior adjudication of a cause of action on the merits, is obviously not present with respect to the withdrawn claims. Therefore, the doctrine of *res judicata* could not be raised as a bar to adjudication of any of the withdrawn claims that had been timely pleaded as elements of the seventh claim. RESTATEMENT OF JUDGMENTS § 48 (1942). There is no other doctrine under which such adjudication would be barred, and the Court's erroneous ruling thus deprived petitioner of due process of law.

Claim 7, embracing all factual allegations incorporated by reference and the prayer for relief in paragraph 30, was timely presented, and none of the elements of that claim is barred by the limitation of § 12 of the Act, 25 U.S.C. § 70k. Since all factual allegations of the first six claims are incorporated in Claim 7, all causes of action based on those allegations were presented timely and remain justiciable. The Commission's discretionary allowance of an amendment of the Petition to "reformulate" those causes of action within the liberal notice requirements of *Snoqualmie Tribe v. United States,* 178 Ct. Cl. 570, 372 F.2d 951 (1967), was clearly proper. The Court of Claims interpretation of "claims" as including all factual predicates of the first six claims is contrary to the terms of the First

Amended Petition, which did not delete or withdraw any factual allegations, and the Court's conclusion is not supported by any other analysis or authority. Therefore, the Court's Order barring adjudication as an element of Claim 7 of any issue constituting a part of the first six claims is wholly arbitrary.

Moreover, the Order creates immense procedural obstacles to the prompt adjudication of Claim 7, which has already been pending for 29 years. Respondent will argue that each triable issue in Claim 7 is barred because it is one of the issues that might have been adjudicated under the first six claims. Already, respondent has taken that position on a score of "accounting" issues, and there are literally hundreds more. The accounting claim will predictably be mired in such sophistry for years to come, again depriving petitioner of its right to full and prompt disposition of its claims under the Act.

CONCLUSION

The writ should issue in this case to uphold Congress' mandate for protection of tribal claimants under the Act, to make effective the provisions of the Special Claims Contract requiring prior approval of any compromise, settlement, or adjustment of petitioner's claims by its attorney, to expunge the Court of Claims' misconstruction of its jurisdiction under the Act and its refusal to follow established precedents of this Court, to construe and apply the pleadings presenting petitioner's claims in accordance with their plain language, the Tribe's obvious intent to obtain prompt adjudication of all claims, and the principle of liberal interpretation for the benefit of the tribe, and to correct the arbitrary dismissal of claims by the Court of Claims. There was manifest injustice below, which the Navajo Tribe asks this Court to review and reverse.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN
& ROBB, P.A.

By _____

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APPENDIX A

In the United States Court of Claims

No. 69

(Decided June 13, 1979)

THE NAVAJO TRIBE OF INDIANS v. THE UNITED STATES

William C. Schaab, attorney of record for plaintiff. *Rodey, Dickason, Sloan, Akin & Robb, Paul D. Barber*, and *Sarah W. Barlow*, of counsel.

Dean K. Dunsmore, with whom was *Assistant Attorney General James W. Moorman*, for defendant.

Before FRIEDMAN, *Chief Judge*, COWEN, *Senior Judge*, and SMITH, *Judge*.

OPINION

FRIEDMAN, Chief Judge, delivered the opinion of the court:

This case, byzantine in complexity, has been transferred from the Indian Claims Commission pursuant to Pub. L. No. 94-465, 90 Stat. 1990 (1976), and is now before us on the parties' requests for review of two rulings of Trial Judge C. Murray Bernhardt. In those rulings the trial judge resolved various contentions of the parties regarding the interrelationship of claims pending in various Commission dockets and the status of certain claims in this case.

We find it unnecessary to resolve most of those contentions since we conclude that the plaintiff voluntarily withdrew all of the claims involved in this case after the applicable limitations period had run, and that those claims therefore are time barred. Accordingly, we dismiss claims one through six and claim eight of the petition.[1]

I.

The original petition in this case, filed with the Indian Claims Commission in July 1950, as Docket No. 69, contained eight claims. Each claim consisted of (1) a general recitation of facts, and (2) a paragraph stating the claim arising from those facts. The initial paragraph of claims two through eight incorporated by reference the general recitations of fact stated at the beginning of the preceding claims. Paragraph 30 of the petition contained the prayer for relief.

The first four claims and the sixth claim essentially alleged (1) violation of the government's obligation, pursuant to an 1848 treaty with Mexico and an 1850 treaty with the plaintiff, to protect the plaintiff's property rights; (2) invalidity of an 1868 treaty with the tribe on the grounds of fraud and duress, unconscionable consideration, and unilateral mistake; and (3) failure to provide educational and other services pursuant to the 1868 treaty. The fifth claim alleged that the government, by exploiting and allowing others to exploit the natural resources of the tribe without adequate consideration, violated its fiduciary duty under the 1868 treaty. The seventh claim, a general accounting claim, has been consolidated with the accounting claims in Docket Nos. 299 and 353, and is not before us here. The eighth claim alleged violation of a promise by officers of the United States to return certain lands "to the

---

[1] This dismissal is without prejudice to the plaintiff's assertion of any of these claims in other dockets involving the plaintiff if those claims in fact are present in those dockets. The dismissal of the claims in this case because the plaintiff voluntarily withdrew them would not support the contention that the dismissal is *res judicata* of the merits of those claims.

East" in return for the Navajos' service in the Apache wars.

In August 1951, the plaintiff's claims attorney decided to divide into four separate dockets the eight claims of the original petition. The plaintiff filed a new petition in each of three new dockets, and allowed the petition in this docket (No. 69) to stand, without modification, as the general pleading. The tribe presented a taking claim, based upon facts originally set forth in Docket No. 69, in the petition in Docket No. 229. A claim for mismanagement of resources was presented in Docket No. 353 for oil and gas resources, and in Docket No. 299 for other resources. Thus, many of the claims originally presented in the original docket (No. 69) overlapped with the claims asserted in the subsequent dockets.

Separation of the plaintiff's claims into four dockets did not simplify or abbreviate the litigation of this case. Although almost three decades have passed since the filing of the original petition, the government has yet to file an answer. Instead, in the words of Trial Judge Bernhardt, there has been a "protracted seige of motions." In response to a government request for greater specificity and a Commission order to file an amended petition in Docket No. 69 no later than September 30, 1969, plaintiff filed a First Amended Petition on October 1, 1969. The entire amended petition read as follows:

> The petition is amended by deleting paragraphs 10, 16, 19, 21, 23, 25, and 29, thereby withdrawing from consideration herein the first, second, third, fourth, fifth, sixth, and eighth claims.

The government, on July 18, 1974, sought entry of final judgment in its favor on those claims. The Commission, on January 23, 1975, granted a motion by the plaintiff to amend its petition in Docket No. 69 by "reformulating" the first six claims. *Navajo Tribe* v. *United States*, 35 Ind. Cl. Comm. 305, 315 (1975). The Commission denied a motion for certification of that ruling to this court. *Navajo Tribe* v. *United States*, 36 Ind. Cl. Comm. 215 (1975).

On June 3, 1976, the government filed a motion to dismiss or for a more definite statement. The Commission transferred the case in Docket No. 69 to this court without ruling on the motion. On January 23, 1978, Trial Judge Bernhardt ruled on the motion, and on May 2, 1978, he issued an order on the tribe's motion for reconsideration of his January 23 ruling. With respect to the Commission's reinstatement of the dismissed claims after the limitations period had run, the trial judge denied the government's motion to dismiss the reinstated claims on the ground that those claims related back to the original petition.

II.

The applicable statute of limitations in the Indian Claims Commission Act, 25 U.S.C. § 70k, is a jurisdictional limitation upon the authority of the Commission to consider claims. *United States* v. *Lower Sioux Indian Community*, 207 Ct. Cl. 492, 501, 519 F.2d 1378, 1382 (1975); *Snoqualmie Tribe* v. *United States*, 178 Ct. Cl. 570, 586, 372 F.2d 951, 960 (1967). The provision, which defines the extent of the government's waiver of sovereign immunity, bars any claim not "presented" to the Commission on or before August 13, 1951. In this case, the original petition in Docket No. 69 was timely filed in July 1950, but the claims in question were withdrawn in 1969. The second amended petition, in effect reasserting the withdrawn claims, was not filed until 1975.

The Commission allowed the plaintiff to reinstate the withdrawn claims in 1975 on the ground that the "reformulated" claims were based upon and related back to the general recitations of fact in the original petition which were not withdrawn. 35 Ind. Cl. Comm. at 307. Although the 1969 amended petition "deleted" only the specific paragraphs which stated the claims in some detail, and not the general factual allegations preceding those paragraphs upon which the claims were based, the deleted paragraphs were the actual statements of the claims. Indeed, the plaintiff recognized in its 1969 amendment that by deleting

those paragraphs it was "*thereby withdrawing from consideration* herein the first, second, third, fourth, fifth, sixth, and eighth *claims*" (emphasis added).

The decision whether to dismiss all or part of a case lies with the plaintiff (subject to any necessary authorizations by the tribunal). In this case, for reasons not fully explained in the record, the tribe's claims counsel chose to withdraw the claims in question. Perhaps the attorney was unable to comply with the Commission's order for greater specificity, or sought to make the case more manageable by simplifying the claims and eliminating or reducing duplication.

Whatever his reasons, whether wise or ill-founded, the decision to withdraw these particular claims was a tactical decision similar to those attorneys constantly must make in the conduct of litigation. The plaintiff is bound by the actions of its attorney.

The plaintiff contends, however, that its attorney had no authority to withdraw those claims. It relies upon paragraph 6 of the contract between it and the attorney, which provided:

> 6. *Compromises and Settlements.* Any compromise, settlement or other adjustment of the claims shall be subject to the approval of the TRIBE and the SECRETARY [OF THE INTERIOR].[2]

The Commission presumed that the word "adjustment" covered the withdrawal of the claims, and noted that the record did not indicate whether the tribe had approved the withdrawal. 35 Ind. Cl. Comm. at 307, n. 2.

We construe this provision as requiring tribal and secretarial approval only of compromises, settlements, and similar adjustments of claims, i.e., the termination of claims in return for some consideration given in exchange therefor. Paragraph 6 did not limit the attorney's authority to withdraw certain claims, several of which probably were duplicative of those in other dockets, for what he perceived

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[2] Although the contract refers to Docket No. 89 before the Commission, we assume that was a typographical error, and the reference should have been to Docket No. 69. There is no Docket No. 89 in this case.

to be sound tactical or strategic reasons. That was precisely the kind of decision the attorney would have to make in carrying out his duty under paragraph 2 of the contract "to diligently prosecute the claims and to exert his best efforts to satisfactorily conclude them within the term of this contract." Indeed, an attorney could not effectively conduct such a major Indian claims case as this if he had to obtain the prior approval of his client and the Secretary before he could take such action.

Trial Judge Bernhardt upheld the Commission's reinstatement of the withdrawn claims on the ground that the second amended petition met the liberal notice requirement applied in determining whether an amended petition filed with the Commission after the limitations period related back to the original timely petition. The trial judge relied on *United States* v. *Lower Sioux Indian Community in Minn.*, 207 Ct. Cl. 492, 519 F.2d 1378 (1975), *United States* v. *Northern Paiute Nation*, 183 Ct. Cl. 321, 393 F.2d 786 (1968), and *Snoqualmie Tribe of Indians* v. *United States*, 178 Ct. Cl. 570, 372 F.2d 951 (1967). Those decisions dealt with the question whether allegations in a timely petition were sufficient to cover the claims asserted in an otherwise untimely amendment. In the *Snoqualmie* case, we held that the requirement of the statute of limitations, that claims be "presented" within the limitations period, "should be read liberally to permit an amended pleading to relate back where there is sufficient notice." 178 Ct. Cl. at 588, 372 F.2d at 961.

That principle, however, has no application in a case in which the plaintiff has withdrawn its original claims and then seeks to reinstate them after the limitations period has run. The question here is not, as in those cases, the construction of the original petition; the issue before us is the effect of the plaintiff's voluntary dismissal of its claims in 1969.

III.

The first amended petition was in effect, if not in form, a voluntary dismissal of the plaintiff's nonaccounting claims

in Docket No. 69. The amendment was filed pursuant to an order of the Commission, and no further authorization or action of the Commission was required. The Supreme Court stated the applicable rule in *Willard* v. *Wood:* "[W]here *from any cause* a plaintiff becomes nonsuit or the action abates or *is dismissed*, and, during the pendency of the action the limitation runs, the remedy is barred." 164 U.S. 502, 523 (1896) (emphasis added). In this case, the claims were dismissed because the plaintiff chose to do so. Following the dismissal, the situation stood as if the withdrawn claims had never been filed. *A. B. Dick Co.* v. *Marr*, 197 F.2d 498, 502 (2d Cir.), *cert. denied*, 344 U.S. 878, *rehearing denied*, 344 U.S. 905 (1952); *Maryland Cas. Co.* v. *Luther*, 41 F.2d 312 (5th Cir. 1930). For purposes of the statute of limitations, the claims contained in the second amended petition were "presented" for the first time in 1975, and the Commission lacked jurisdiction to hear them.[3]

IV.

Before concluding this opinion, we advert to a problem that exists in this case and probably in a number of other cases that the Indian Claims Commission recently has transferred to this court. That is the subject of delay. All of these cases were pending before the Commission for more than a quarter of a century, and some of them still are a long way from completion. The cases of which this docket is one part involve a wide variety of claims by the Navajo Tribe. The government has not yet filed its answer in some or all of the dockets. Unless drastic and effective steps are taken to expedite the proceedings in these Indian Claims Commission cases, they threaten to drag on indefinitely.

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[3] The plaintiff challenges characterization of the issue as jurisdictional. It argues that, since it withdrew only the prayers for relief and not the claims themselves, those claims were "subsumed" under the comprehensive prayer for relief of paragraph 30 and under claim 7's incorporation of preceding factual allegations. As noted above, however, the withdrawn paragraphs were not merely prayers for relief, and claim 7 incorporated only general recitations of fact. Moreover, the Commission recognized that the claims in question were withdrawn, not subsumed in the surviving claim. *Navajo Tribe* v. *United States*, 31 Ind. Cl. Comm. 40, 41 (1973).

The trial judges have an obligation to expedite these cases, and to take all necessary steps to insure their speedy determination. Many of the cases are complicated and difficult. There is a need for innovative handling and treatment, perhaps to devise new procedures that will end the delays that have plagued these cases for so many years. We have faith in the ability of the trial judges to develop such techniques. We expect the cases to be completed within a reasonable time.

More specifically, we direct the trial judge in the Navajo cases to file within 90 days, and after consultation with counsel, a timetable setting forth firm time limits for the proceedings in Docket Nos. 229, 299, and 353. These time limits should cover the filing of any further pleadings and amendments thereto, the filing of all dispositive or procedural motions, the completion of pretrial proceedings, and the trial of the cases. We expect the other trial judges to adopt similar timetables in cases transferred from the Commission.

CONCLUSION

Claims 1 through 6 and claim 8 in Docket No. 69 are dismissed.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 69

THE NAVAJO TRIBE OF INDIANS

v.

THE UNITED STATES

Before FRIEDMAN, *Chief Judge*, COWEN, *Senior Judge*, and SMITH, *Judge*.

Order

The plaintiff has filed a motion for clarification of our opinion of June 13, 1979, in which we dismissed claims 1 through 6 and claim 8. In so doing, we stated that "This dismissal is without prejudice to the plaintiff's assertion of any of these claims in other dockets involving the plaintiff if those claims in fact are present in those dockets." (Footnote 1). Plaintiff now asserts that in this footnote we contemplated the possibility that the dismissed claims still might be asserted as part of claim 7 in docket No. 69, a general accounting claim that has been consolidated with the accounting claims in docket Nos. 299 and 253, and which therefore was not before us.

Plaintiff is mistaken. Footnote 1 was intended to make clear that despite the dismissal of claims 1 through 6 and claim 8, those claims could be asserted in the other pending dockets (Nos. 229, 299 and 353) if in fact they "are present in those dockets." The determination whether the dismissed claims are so present is a matter for the trial judge. Obviously, we would not have dismissed claims 1 through 6 and claim 8 in docket No. 69 if we had contemplated that all of those claims could be fully pressed under claim 7 in that docket. To the contrary, we held that plaintiff's previous

withdrawal of claims 1 through 6 and claim 8 in docket No. 69 precluded plaintiff from subsequently reasserting those claims because at the time of reassertion the statute of limitations had run on them. The plaintiff may pursue these dismissed claims only if and to the extent they are also part of the claims asserted in the dockets other than docket No. 69.

BY THE COURT

/s/ DANIEL M. FRIEDMAN
Daniel M. Friedman
Chief Judge

September 28, 1979

Filed: 7-11-50

APPENDIX C

BEFORE THE INDIAN CLAIMS COMMISSION

No. 69

THE NAVAJO TRIBE OF INDIANS

v.

THE UNITED STATES OF AMERICA

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INDEX TO CLAIMS*

First Claim: Navajo lands; Treaty of September 24, 1850 1

Second Claim: Navajo lands; Treaty of August 12, 1868: Alternative Claims 7

Third Claim: Agricultural lands; Damage to reservation lands; Treaty of August 12, 1868 10

Fourth Claim: Education; schools 14

Fifth Claim: Natural resources and tribal property 18

Sixth Claim: Miscellaneous facilities; Treaty of August 12, 1868 20

Seventh Claim: Tribal funds; fiduciary relationship 21

Eighth Claim: Agreement for service in Apache wars 23

Appendix A: Treaty of September 24, 1850 25

Appendix B: Treaty of August 12, 1868 29

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* This index is submitted for convenience only and is not a part of the petition. The titles in the index, which also appear in parentheses at the commencement of each claim, cannot by reason of their brevity wholly or adequately represent the subject matter and are not to be construed as a part of the allegations for any purposes.

13a

BEFORE THE INDIAN CLAIMS COMMISSION

No. .....

THE NAVAJO TRIBE OF INDIANS

v.

THE UNITED STATES OF AMERICA

PETITION

To the Honorable Commissioners of the Indian Claims Commission:

Your petitioner, the Navajo Tribe of Indians, respectfully represents and alleges as follows:

First Claim

(Navajo lands; Treaty of September 24, 1850)

1.

Petitioner is a tribal organization recognized by the Secretary of the Interior as having authority to represent the Navajo tribe, and authorized by Section 10 of the Act of Congress approved August 13, 1946, Public Law 726, 79th Congress, 2d Session (60 Stat. 1049), an act to create and establish an Indian Claims Commission, to present claims to the said Commission for and on behalf of the petitioner and its members, who live upon and about their reservation in the States of New Mexico, Arizona, Utah and Colorado under the jurisdiction of the United States as exercised by and through the United States Department of the Interior.

2.

The claims herein set forth are presented pursuant to the aforesaid Indian Claims Commission Act; jurisdiction to hear and determine the said claims, and each of them, is conferred on the Commission by Section 2 of the said Act.

14a

3.

None of the claims herein set forth has been the subject of any action taken by Congress or by any department of the government or in any judicial proceeding; none is included, in whole or in part, in any suit pending in the Court of Claims or in the Supreme Court of the United States, and none has been filed in the Court of Claims under any legislation whatsoever.

4.

Pursuant to a contract executed July 17, 1947, and approved by the Commissioner of Indian Affairs on behalf of himself and the Secretary of the Interior on August 8, 1947, petitioner retained Norman M. Littell as general counsel and claims attorney, together with associate attorneys S. King Funkhouser and, by amendment duly executed and approved, Rufus G. King, Jr. The claims herein set forth are accordingly presented by petitioner's attorneys, Norman M. Littell, S. King Funkhouser and Rufus G. King, Jr.

5.

For centuries prior to the year 1864 petitioner and the various tribes and bands amalgamated with it during this period had occupied a section of the North American continent, now part of the southwestern United States, which was approximately bounded southward and eastward by four mountains, traditionally sacred to the Navajos and presently known as Mount Taylor in New Mexico, the San Francisco Peaks in Arizona, the La Plata Mountains in Colorado, and Mount Baldy in Colorado, and to the north and west by the Dolores and Colorado rivers. Most of this area, comprising approximately 45,000 square miles, was rich and fertile, a homeland where petitioner enjoyed all the rights of a free and sovereign people, governing itself, enjoying the fruits of industry and husbandry at a comparatively high level of aboriginal civilization, and armed in the fashion of the times to defend itself and repel aggressors.

6.

Attempts were made to subjugate petitioner by representatives of the Spanish Crown in the seventeenth and eighteenth centuries, and by representatives of the Mexican Government after 1823, but petitioner's right, title, and interest in and to petitioner's lands were fully protected and preserved pursuant to Spanish and Mexican law. In 1846 the government of Mexico renounced its sovereignty over this area in favor of the respondent, and thereafter respondent's agents and citizens invaded petitioner's homeland in ever-increasing numbers, until a state of open hostility gradually developed. Before mounting pressure, petitioner withdrew to the wilder areas now identified as the vicinity of Navajo Mountain, the Canyon de Chelly, and the headwaters of the San Juan River. Military expeditions were sent into these areas to attack petitioner; retaliatory raids against the invader were organized and vigorously carried out. After two centuries of generally peaceful contiguity with white men, during which petitioner's members had acquired sheep and had gradually shifted from pueblo life to a pastoral culture, the Navajo took to arms and emerged as an important center of resistance in the path of the white man, as represented by respondent's agents and citizens.

7.

Petitioner was at all times ready to make an honorable reconciliation in so far as its members were apprised of and understood the white man's ways. A treaty of peace was negotiated and concluded between petitioner and respondent's agents in November, 1846, but was not ratified by respondent's Senate, or thereafter respected by respondent. A second treaty was negotiated and concluded between petitioner and respondent's agents on September 9, 1849, which said second treaty was ratified by respondent's Senate on September 9, 1850, and proclaimed by President Millard Fillmore on September 24, 1850 (9 Stat. 974). A true copy of said Treaty of 1850 is attached hereto and made a part hereof as "Appendix A." Article I thereof provides that petitioner shall be under the jurisdiction and protection of the United States pursuant to

the terms of the Treaty of Guadalupe Hidalgo. Article II of said Treaty of 1850 pledges "perpetual peace and friendship." Article III provides that the laws of the territory of New Mexico shall be applied and enforced in petitioner's country, and that the same shall be annexed to and made a part of the said territory, and Article VI provides that any person murdering or robbing petitioner's members shall be made answerable under laws of the United States. Article VIII provides that respondent shall establish military and trading posts in petitioner's country. Article IX provides:

> "Relying confidently upon the justice and the liberality of the aforesaid government (respondent), and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Navajoes that the government of the United States shall, at its earliest convenience, designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians."

8.

Petitioner was assured by a protocol between the Mexican and the American governments and by the terms of the Treaty of Guadalupe Hidalgo, proclaimed by President Polk on July 4, 1848, that titles to all kinds of property, personal and real, existing in the ceded territories, were those which were legitimate titles under Mexican law, and that petitioner would be protected in the free enjoyment of its liberty and property by the respondent. Under Spanish law, prior to the attainment of Mexican independence in 1824, the rights of Indians to the possession and the full amount of lands belonging to them was fully protected, and those who sought to seize Indian lands or despoil Indian property were severely punished. After Mexico became independent of Spain in 1824, the rights of Indians were confirmed, enlarged, and strengthened and they were given equality of rights with other citizens and their ownership of property was fully protected. By the aforesaid Treaty of Guadalupe Hidalgo, the respondent agreed to protect and maintain the petitioner and its members in the full enjoy-

99-840 O - 82 - 5

ment of their liberty and property. By the aforesaid Treaty of 1850, respondent assumed exclusive jurisdiction and protection of the petitioner and petitioner's property rights, but respondent made no effort to abide by, carry out, or enforce the aforesaid Treaty of 1850. On the contrary, petitioner was induced to negotiate and conclude two subsequent treaties with respondent's agents, one in 1855 and one in 1857, neither of which was ratified by respondent's Senate, or thereafter respected by respondent. The inconsistency, unreliability, and faithlessness of respondent's agents, and the series of negotiations conducted by them in this period, caused the Navajo rightfully to discredit and mistrust treaty terms.

9.

Respondent negligently and willfully departed from the standards of fair and honorable dealings in its relations with petitioner during the entire period from 1846 to 1868, in all said relations and, without limitation, in confusing and deceiving petitioner by negotiating various and inconsistent agreements and treaties and by permitting divers persons to harass petitioner and drive petitioner from rich and valuable portions of its homelands, as more particularly described in paragraph 5 above. Respondent failed, neglected, and refused to abide by, and committed numerous breaches and violations of, the terms of the aforesaid Treaty of 1850, although said treaty had been duly ratified by the Senate and proclaimed by the President of the United States.

10.

WHEREFORE, as its first claim, petitioner alleges:

(a) Respondent failed to accord to petitioner the right, title, interest, benefits, and enjoyment of property conferred on Indians by Spanish and Mexican law, pursuant to the Treaty of Guadalupe Hidalgo, as provided by the aforesaid Treaty of 1850.

(b) Respondent failed to apply or enforce the laws of the territory of New Mexico in petitioner's country, failed to annex petitioner's country to the territory of New Mexico,

and failed to apply and enforce the laws of the United States therein, and, on the contrary, respondent maintained military law until 1873 and intermittently thereafter, thereby subjecting petitioner's members to great suffering and hardship and depriving them of the fruits and benefits to which they would otherwise have been entitled as citizens of the territory of New Mexico, both prior to and after the accession of that territory to statehood in 1912.

(c) Respondent failed to protect petitioner's members against being murdered and robbed, as specifically undertaken in Article VI of the aforesaid Treaty of 1850, and, on the contrary, respondent's agents tolerated, acquiesced in, and sometimes led raids and expeditions into petitioner's country for the purpose of murdering and robbing petitioner's members, said raids and expeditions being conducted both by respondent's armed forces and by unauthorized bands of territorial troops, adventurers, Mexicans, and hostile Indians.

(d) Respondent failed to establish or maintain military or trading posts in petitioner's country, as specifically undertaken in Article VIII of the aforesaid Treaty of 1850, thereby depriving petitioner of the protection, order, and civilizing contacts which would have been afforded thereby, and aggravating the grievous situation and events hereinafter set forth.

(e) Respondent failed to designate, settle, and adjust petitioner's territorial boundaries, as specifically undertaken in Article IX of the aforesaid Treaty of 1850, in violation of the terms of said treaty and of the Treaty of Guadalupe Hidalgo, and thereby caused petitioner to be driven from and deprived of its homelands to the great loss and damage of the petitioner in that petitioner thereby lost approximately 20,000 square miles of rich land which was rightfully the property of petitioner, and petitioner's people were therefore confined to barren and unproductive lands where they have ever since eked out a bare existence, all as more particularly set forth hereinafter.

19a

Second Claim

(Navajo lands; Treaty of August 12, 1868: Alternative Claims)

11.

Petitioner restates and reaffirms each and every allegation of paragraphs 1 through 9, and further respectfully represents and alleges as follows:

In addition to those duties which respondent owed to the petitioner and its members pursuant to treaty obligations, respondent owed the duties of a guardian towards its wards, but as a result of respondent's failures, neglect, and breaches of its said duties toward petitioner and its members, arson, murder, and pillage continued to be perpetrated against them, and in retaliation by them, until, in 1863, full-scale warfare was initiated by respondent's agents. In the spring of 1864, after their crops had been ravaged and their dwellings fired, petitioner's members were overwhelmed by armed forces of the respondent. Many Navajos were killed, and the balance were compelled to surrender. Thereafter, together with their women and children and aged and infirm, they were mercilessly herded and driven on foot in a southeasterly direction a distance of 300 miles from their homeland to Fort Sumner, New Mexico, where those who had survived this full-scale war and the "Long March" were imprisoned under military guard.

12.

For a period of four years thereafter petitioner's members were held by armed forces of the respondent in a state of imprisonment and involuntary servitude at Fort Sumner, crowded into a small area, inadequately clothed, badly housed and fed, ravaged by disease, and reduced by close confinement and complete disruption of all their normal and historic ways of living to a destitute and desperate condition.

13.

Such was the condition of the imprisoned remnants of the petitioner's people in the spring of 1868 when a treaty was submitted by the respondent to the head men of the Navajos.

On June 1 the treaty was signed. None of the signers on behalf of the petitioner was literate. No legal counsel was appointed to advise the petitioner's head men, and no legal or other disinterested advice was available to them. Only the advice and assistance of the respondent's agents and employees and the interpretation of language by respondent's interpreters were available to petitioner. All of the signatures affixed by and on behalf of petitioner were by mark only. Thus the Treaty of 1868 was signed.

14.

The said treaty was submitted to and ratified by the Senate of the United States on July 25, 1868 (15 Stat. 667), and proclaimed by President Johnson on August 12, 1868. Annexed hereto and made a part hereof as "Appendix B" is a true copy of said Treaty of 1868.

15.

Article II of the aforesaid Treaty of August 12, 1868 (Appendix B), defined and limited the boundaries of the Navajo reservation as follows:

> "The United States agrees that the following district of country, to wit: bounded on the north by the 37th degree of north latitude, south by an east and west line passing through the site of old Fort Defiance, in Canon Bonito, east by the parallel of longitude which, if prolonged south, would pass through old Fort Lyon, or the Ojo-de-oso, Bear Spring, and west by a parallel of longitude about 109° 30′ west of Greenwich, provided it embraces the outlet of the Canon-de-Chilly, which canon is to be all included in this reservation, shall be, and the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; . . ."

The said territory thus defined in the Treaty of 1868 was a meager and barren portion of petitioner's homeland and of the rich and fertile area upon which petitioner and its members had theretofore subsisted.

21a

From time to time, through divers laws and executive orders, additional areas of land were transferred from the public domain to the Navajos as additions to the aforesaid reservation described in the Treaty of 1868, but such additions were frequently reduced, rescinded, or cancelled under pressure from non-Indian settlers who desired said lands for themselves. At no time has petitioner renounced its right, title, and interest in and to the lands described in paragraph 5 above, and at no time have the additions or attempted additions to the said reservation by the respondent been sufficient in area to restore to the petitioner the aforesaid original homelands.

16.

WHEREFORE, as its second claim, petitioner alleges in the alternative as follows:

First Alternative

(a) That the said Treaty of 1868 and each and every provision thereof is invalid and void on the grounds of fraud, duress, unconscionable consideration and unilateral mistake; that the lands described in paragraph 5 above were wrongfully seized and taken from petitioner by said fraud and duress.

(b) Respondent at all times material herein failed and refused to restore to the petitioner the aforesaid lands wrongfully seized by others by and with the consent and wrongful approval of the respondent, thereby depriving petitioner of approximately 20,000 square miles of land as described in paragraph 5 above, and respondent at all times material herein failed and refused to pay just compensation to the petitioner for the said lands, and in consequence there is due and owing to petitioner a sum which can only be determined after this Commission first finds and determines the boundary lines and fair value of the area thus wrongfully taken.

Second Alternative

The said Treaty of 1868 between the petitioner and the respondent should be deemed to be revised in each and every

respect set forth hereinafter in the allegations of this and succeeding paragraphs of this petition on the grounds of fraud, duress and unconscionable consideration, mutual or mistake in law and in fact, and particularly said treaty should unilateral mistake in law and in fact, and particularly said treaty should be deemed to be revised to include as reservation lands all of that area designated in paragraph 5 above to which petitioner was rightfully entitled pursuant to the Treaty of Guadalupe Hidalgo, the aforesaid Treaty of 1850, and by right of aboriginal occupancy. In so far as the said treaty sought to bind petitioner to accept the aforesaid reservation boundaries as the limits of its tribal land, it was not accepted and approved by petitioner's head men as their free and voluntary acts but was accepted only under threat, duress, and in the presence of force. At all times since the execution of said treaty, the petitioner's members have been wrongfully excluded and barred from, and prevented from returning to, and have been uncompensated for the loss of, their true and rightful possession of the homeland of the Navajos.

Third Claim

(Damage to reservation lands; Treaty of August 12, 1868)

17.

Petitioner restates and reaffirms each and every allegation of paragraphs 1 through 9 and 11 through 15, and further respectfully represents and alleges as follows:

Petitioner's members were at all times material herein uneducated and uninformed in regard to the white man's ways and, until the summer of 1947, were without legal counsel to advise petitioner in respect to petitioner's legal rights. Petitioner and petitioner's members have at all times been diligent and faithful in complying with the terms of the Treaty of 1868 and in carrying out each and every obligation required of petitioner and petitioner's members without knowledge of the true legal status of the said treaty as hereinabove alleged.

Should the Commission find pursuant to the first alternative of the second claim (paragraph 16 above) that the said Treaty

of 1868 is invalid on the grounds of duress, fraud, and mistake, as hereinabove alleged, then and in that event the ordinary standards of fair and honorable dealing between the petitioner and the respondent, and the duties and obligations of the respondent as guardian of petitioner and of petitioner's members, demanded that the respondent take all steps necessary in order to civilize, educate, and establish the petitioner's members in agricultural and other pursuits to the end that they should become self-supporting, independent citizens, and responsible members of peaceable communities, and petitioner alleges that the minimum of such obligations of the respondent, subject to qualifications and exceptions hereinafter stated, were indicated in the so-called Treaty of 1868, and that said treaty be considered as specifying in part the duties owing by the respondent to its wards. Standards of fair and honorable dealing, and the duties of respondent as guardian, required respondent to exercise the highest degree of care in all acts and services in carrying out its said obligations and especially in dealing with petitioner's property and funds. In the event of such finding by the Commission, holding invalid the said Treaty of 1868, then the allegations hereinafter stated in the following paragraphs of this petition, in so far as they refer to breaches and violations of the said Treaty of 1868 by the respondent, are submitted as setting forth the failures, breaches, and violations of said minimum of undertakings, promises, and commitments by the respondent, as departures from the standards of fair and honorable dealings in respondent's relations to the petitioner, and as failures of respondent in the performance of its duties as guardian for the petitioner and petitioner's members.

Should the Commission sustain the second alternative of the second claim and find that the said treaty is valid but that claims should be allowed which would result if said treaty were revised on the grounds of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether in law or in fact, or on any other grounds cognizable in a court of equity, then and in that event the allegations hereinafter set

forth in this petition are submitted as setting forth such claims together with respondent's breaches and violations of the said treaty, as departures from standards of fair and honorable dealings in respondent's relations to petitioner, and as failures of respondent in the performance of its duties as guardian for the petitioner and petitioner's members.

18.

Petitioner and petitioner's members have at all times been diligent and faithful in trying to comply with the terms of said Treaty of 1868 to the best of their understanding and abilities, but respondent has failed and refused to carry out its obligations thereunder.

The said Treaty of 1868 (Appendix B) provides in part:

> "ARTICLE VI. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation . . .
>
> "ARTICLE VII. When the head of a family shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of two years, he shall be entitled to receive seeds and implements to the value of twenty-five dollars."

Instead of complying with the provisions of the treaty and endeavoring to assist and aid the petitioner and its members in settling upon agricultural land, the surviving members of petitioner's tribe were taken, again on foot, after the said treaty was executed, some to Fort Wingate near Gallup, New Mexico, and the rest to Fort Defiance, Arizona, where they were held under conditions of severe hardship through the winter of 1868-69 and through most of the year 1869. White men had in the period of petitioner's captivity entered upon and seized most of the rich lands theretofore owned and oc-

cupied by Navajos, except for the inadequate and relatively barren area designated as their reservation.

Thereafter petitioner's members were released upon this reservation. With the exception of a limited number of families, particularly along the San Juan River, settlement in farming pursuits was then, and at all times since has been, impossible, all of which was known to respondent at the time when said treaty was signed, but was not known to petitioner. Various seeds and basic agricultural implements in an amount and of a value unknown to your petitioner, were distributed indiscriminately among petitioner's members, but it was not possible for them to take full advantage of the terms of said treaty provision because the purported right of settlement on specific lands for agricultural pursuits constituted a deception and delusion inasmuch as the lands assigned within the aforesaid reservation, with the exception of a limited area, were then, and at all times since then have been, too arid and barren for farming purposes. Respondent failed and neglected to advise petitioner's members as to the import and operation of the provisions of Article VII of the said treaty, and although lands suitable for farming were available to respondent throughout petitioner's former homeland, and could and should have been supplied to petitioner, respondent at all times failed and refused to supply such lands, compelled petitioner's members to subsist on herding sheep as aforesaid, and encouraged the Navajos to build up their flocks to a point where each family would have at least a thousand head of sheep.

As a direct result of said policies and practices of the respondent, by the year 1937 the said reservation was overcrowded, eroded, and irreparably damaged by overgrazing, and petitioner had been led by the respondent down a blind avenue affording no possibility for the petitioner's people to become self-sufficient in a productive economy. Respondent's failure to supply agricultural land, as promised in the Treaty of 1868, to relieve the grazing areas, and respondent's encouragement of grazing as almost the exclusive economy of the Navajos thus brought the petitioner to a state of poverty and destitution

so that public charity has been necessary over a period of years to alleviate hardship and suffering.

19.

WHEREFORE, as a third claim petitioner alleges that respondent has failed, neglected, and refused to abide by the terms of the aforesaid Treaty of 1868, has broken the terms thereof, has departed from standards of fair and honorable dealing, and has violated its duties as guardian for the petitioner, in the following respects:

(a) Respondent at all times failed to provide agricultural land for the heads of Navajo families, although said lands were at all times available to the respondent for distribution in accordance with the terms of the aforesaid treaty.

(b) The reservation lands to which petitioner was confined were damaged and injured by overgrazing to an irreparable extent in many areas, and in other areas in such a manner and to such an extent that only years of work and a very great expenditure of funds beyond the means of the petitioner could restore said lands and bring them back to their normal and proper grazing capacity, all to the petitioner's great loss and damage.

Fourth Claim

(Education; schools)

20.

Petitioner restates and reaffirms each and every allegation of paragraphs 1 through 9, 11 through 15, and 17 and 18, and further respectfully represents and alleges as follows:

Article I of the aforesaid Treaty of 1868 (Appendix B) provides in part, "From this day forward all war between the parties to this agreement shall forever cease. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it . . ." Article V provides that heads of Navajo families may settle on 160 acres of

selected lands, and single members of the tribe may settle on 80 acres of such lands. Article VI provides as follows:

> "In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.
>
> "The provisions of this article to continue for not less than ten years."

On its part, the petitioner relinquished the most fundamental right of a free people—the right to protect and defend itself—and in return it received respondent's pledge of peace, education, and assistance in adapting itself to the ways of the white men. In forcing petitioner's members to abandon their own way of life, respondent solemnly pledged its honor to teach them the ways of American civilization and to provide education so that they could espouse the only way of life left open to them, namely, active participation in the new society being built around them.

Various efforts have been made by respondent from time to time, and various sums of money have been authorized and expended, to fulfill its obligations in educating petitioner's members and preparing them to take a fitting place in the culture and society of respondent, but such efforts have been patently insufficient, ineffectual, and piecemeal, and at no time have they been realistically related to the size of the Navajo population. Respondent's expenditures have been inadequate, wasteful, ill-advised, and poorly administered, and have not fulfilled the pledges made by respondent in the said Treaty of 1868. Respondent at all times failed to supply the means

of civilizing the Navajos; at the outset, in lieu of the schoolhouse and teacher promised for every 30 children, only one schoolroom and the intermittent services of one teacher were provided for the entire tribe. Seventy-eight years thereafter, when the aforesaid Indian Claims Commission Act was enacted, petitioner's members, numbering approximately 61,000, were still living in an impoverished and exhausted land, in squalor and abject poverty, without training in health practices, citizenship, or ways of economic development, afflicted with the highest tuberculosis and infant mortality rates in the United States, as well as high incidence of diarrhea, dysentery, pneumonia, dental caries, trachoma, skin and venereal diseases. After years of neglect and disregard of its treaty obligations by respondent, petitioner's members constitute a submerged, isolated, and broken people, of whom approximately 88 per cent are illiterate and unable to speak the English language, 66 per cent have no schooling whatever, while the median number of school years for the tribe is less than one year, and no school facilities whatever exist for 16,000 out of 21,000 children of school age. Adequate schoolhouses have never been provided. Teachers have never been engaged in sufficient numbers. Respondent's agents and employees have made no consistent efforts to induce or enable petitioner's members to send their children to such inadequate schooling facilities as were, in fact, made available, and such facilities have from time to time been neglected, allowed to deteriorate and become unfit for use, and closed or abandoned. Moreover, respondent, in its superior experience and with the wide knowledge available to it, at all times knew that the facilities provided would be and have been ineffectual to achieve the end, viz., to give "the elementary branches of an English education," contemplated and intended by the parties—taking into account the wide dispersion of petitioner's community. Petitioner could not induce its children to attend the schools when there were no schools to attend, or when the schools were too few and too remote from where petitioner's members lived.

As a direct and proximate result of the said violations of treaty obligations and of respondent's bungling, neglect, and default, the great majority of petitioner's members live in a state of suffering and uncomprehending bewilderment, without self-reliance, set apart from, and powerless to participate on equal terms with, their fellow countrymen in the agricultural and industrial life of the nation to which they contributed so much in times of peace and in times of war.

21.

WHEREFORE, as a fourth claim petitioner alleges that respondent has failed, neglected, and refused to abide by the terms of the aforesaid Treaty of 1868, has broken the terms thereof, has departed from standards of fair and honorable dealing, and has violated its duties as guardian for the petitioner, in the following respects:

(a) Respondent has by said conduct failed and neglected to insure the civilization of petitioner and to maintain an honorable peace, in violation of the intent, spirit, and purpose of the said Treaty of 1868, and in disregard of the express pledges, promises, and affirmations made therein, and has thereby caused and brought about the downfall of the petitioner from independence, health, and self-sufficiency, to the grievous conditions and the abject circumstances related in paragraph 20 above.

(b) Respondent has continuously failed and neglected to serve and discharge the terms of the said Articles I, V, and VI of said Treaty of 1868, and each and every part thereof. Respondent has thus continuously defaulted, at all times material herein, in its obligation to provide school facilities and teachers, the same being a continuous obligation, from the date of the said Treaty of 1868 to the enactment of the aforementioned Indian Claims Commission Act, the said default constituting a breach of the Treaty of 1868 and operating to petitioner's great loss and damage.

30a

Fifth Claim

(Natural resources and tribal property)

22.

Petitioner restates and reaffirms each and every allegation of paragraphs 1 through 9, 11 through 15, 17 and 18, and 20, and further respectfully represents and alleges as follows:

Respondent has at all times since the captivity of petitioner exercised complete dominion and control over petitioner's tribal property, and has held and does now hold title to the reservation lands in a fiduciary capacity for the use and benefit of petitioner. Article II of the aforesaid Treaty of 1868 (Appendix B) provides that the reservation of the Navajos was originally "set apart for the use and occupation of the Navajo tribe of Indians," and also:

> ". . . that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employes of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article."

Notwithstanding the foregoing restrictions, respondent has tolerated and allowed many persons in and upon the reservation and areas subsequently added thereto for various unauthorized purposes in derogation of petitioner's exclusive right of occupancy and exclusive enjoyment of all natural resources and earnings and benefits therefrom. Such unauthorized persons have profited on resources of the reservation and have exploited petitioner's members, pre-empted land rightfully set apart for use and occupation of petitioner's members, and drawn many millions of dollars out of the weak economy of the tribe, without payment of adequate compensation therefor, all to petitioner's great prejudice and damage.

23.

WHEREFORE, as a fifth claim petitioner alleges that respondent has failed, neglected, and refused to abide by the terms of the aforesaid Treaty of 1868, has broken the terms

thereof, has departed from standards of fair and honorable dealing, and has violated its duties as guardian for the petitioner, in the following respects (enumerated without limitation):

(a) Respondent has tolerated and allowed certain persons to remove oil and gas from lands set apart for the use of petitioner and its members, and has sold such oil and gas to divers persons for an inadequate consideration at less than the true market value of said oil and gas, all to petitioner's great loss and damage.

(b) Respondent has mined coal for its own use, and tolerated and allowed certain persons to mine and remove coal from lands set apart for the use of petitioner and its members, and to buy such coal for an inadequate consideration, all to petitioner's great loss and damage.

(c) Respondent has removed timber for its own use, and tolerated and allowed certain persons to remove timber from lands set apart for the use of petitioner and its members, and to buy such timber for an inadequate consideration at less than the true market value thereof, all to petitioner's great loss and damage.

(d) Respondent has mined and removed vanadium ore for its own use and tolerated and allowed certain persons to mine and remove vanadium ore, containing valuable uranium and other minerals, from lands set apart for the use of petitioner and its members, and to buy such vanadium ore for an inadequate consideration at less than the market value thereof, all to petitioner's great loss and damage.

(e) Respondent has allowed and permitted certain persons to enter upon and transact business of various sorts on petitioner's reservation without payment of compensation to petitioner, and has permitted certain persons to graze livestock upon said lands, all to petitioner's great loss and damage.

(f) Respondent has granted and conveyed and allowed to be granted and conveyed divers rights of way on and over

petitioner's reservation lands without adequate compensation and without compliance with the terms of the Treaty of 1868, without payment of adequate compensation therefor, all to petitioner's great loss and damage.

Sixth Claim

(Miscellaneous facilities; Treaty of Aug. 12, 1868)

24.

Petitioner restates and reaffirms each and every allegation of paragraphs 1 through 9, 11 through 15, 17 and 18, 20, and 22, and further respectfully represents and alleges as follows:

By Article III of the said Treaty of 1868 (Appendix B) the respondent undertook and bound itself to cause to be built one warehouse, one carpenter shop, one blacksmith shop, one schoolhouse, and one chapel (besides a residence for one agent). The said Article III was a standard undertaking made by respondent in negotiations with various Indian tribes and groups subjugated and placed on reservations during this period. Facilities so limited might have been adequate to provide service for, and instruction to, tribes and groups of limited numbers and confined to small reservations, but said facilities were patently inadequate for petitioner's members who were widely dispersed over a large territory. Even such inadequate facilities were not properly furnished nor properly equipped for several years after the execution of the said treaty.

25.

WHEREFORE, as a sixth claim petitioner alleges that respondent has failed, neglected, and refused to abide by the terms of the aforesaid Treaty of 1868, has broken the terms thereof, has departed from standards of fair and honorable dealing, and has violated its duties as guardian for the petitioner, in the following respects:

(a) Article III should have been revised on the grounds of mutual mistake in that the provisions thereof were wholly

99-840 O - 82 - 6

inadequate to accomplish the purpose mutually intended and understood, and in that the provisions as set forth in said treaty constituted a deception and an illusion of consideration wholly misleading to petitioner. Said treaty should have provided for the construction of at least one warehouse, one carpenter shop, one blacksmith shop and one chapel for each 1,000 Navajos, namely, for not less than 10 of each such structures at various places over said reservation accessible to the said Navajos.

(b) Respondent failed and neglected to discharge the obligation imposed by the said Article III, revised or not revised, the same constituting a breach of the Treaty of 1868, all operating to petitioner's great loss and damage.

Seventh Claim

(Tribal funds; fiduciary relationship)

26.

Petitioner restates and reaffirms each and every allegation of paragraphs 1 through 9, 11 through 15, 17 and 18, 20, 22, and 24, and further respectfully represents and alleges as follows:

At all times since the respondent took jurisdiction over the petitioner and asserted sovereignty over petitioner's homeland from and after the Treaty of Guadalupe Hidalgo proclaimed in 1846, petitioner's property and funds have been in the care, custody, and jurisdiction of the respondent. Respondent has at all times owed to the petitioner that high degree of fiduciary duty and accountability commonly associated with the relationship of guardian and ward as hereinabove alleged, but respondent has never rendered to petitioner a true and complete accounting for all transactions carried out by the respondent, its officers, agents, and employees, in receiving and disbursing income and receipts from petitioner's property held in trust by the respondent and in expending tribal funds, and there were many instances of improper or wrongful use or expenditure of such funds by the respondent for other than tribal purposes.

27.

WHEREFORE, as a seventh claim petitioner alleges that respondent has failed, neglected, and refused to abide by the terms of the aforesaid Treaty of 1868, has broken the terms thereof, has departed from standards of fair and honorable dealing, and has violated its duties as guardian for the petitioner, in the following respects:

(a) Respondent has through its agents and officers so managed petitioner's tribal funds and assets that the said tribal funds and assets have been wasted and dissipated, all to petitioner's great loss and damage.

(b) The President of the United States has from time to time designated lands, and the Congress of the United States has from time to time appropriated funds, for the use and benefit of petitioner's members. Various goods, revenues, earnings, and payments have come into the possession of respondent's agents and employees as trustees for petitioner's members. Respondent has failed and neglected to account adequately or correctly to petitioner for such receipts, allocations, disbursals, and disposal of such aforesaid lands, funds, goods, revenues, earnings, and payments, the same being in the possession and control of respondent.

(c) No general accounting has ever been submitted to petitioner by the respondent setting forth all of the transactions and items for which tribal funds, or receipts and disbursements for tribal lands and properties, have been expended by respondent. Various instances of misappropriations and mismanagement on the part of respondent's agents and employees, and by other persons acting with the knowledge of and in collusion with the said agents and employees, have occurred from time to time in amounts presently unknown and which can only be revealed by a general accounting, all to the great damage and loss of the petitioner.

35a

Eighth Claim

(Agreement for service in Apache wars)

28.

Petitioner restates and reaffirms each and every allegation of paragraphs 1 through 9, 11 through 15, 17 and 18, 20, 22, 24, and 26, and further respectfully represents and alleges as follows:

During the year 1886 the respondent, being engaged in war against the Apache Tribe of Indians, solicited members of petitioner's tribe to serve as scouts, reserves, and in other supporting capacities with its armed forces. Petitioner's chiefs and head men agreed with respondent's military officers to provide guides and scouts to serve as aforesaid upon condition that respondent return to petitioner its homelands "to the East," which phrase meant, and was understood by all parties to mean, the lands described in paragraph 5 above. Respondent's officers, purporting to act for and bind respondent, accepted this condition, and petitioner's members risked their lives and rendered extensive and valued services to respondent in said wars in reliance on said promises.

29.

WHEREFORE, as its eighth claim petitioner alleges that respondent has refused and failed to return petitioner's homelands, or to compensate petitioner for their value, thereby violating the said promise and agreement of 1886 which petitioner's members had faithfully and diligently acted upon.

30.

The foregoing averments and claims summarize a long record of wrongful acts and omissions on the part of respondent, hitherto unredressed.

WHEREFORE, your petitioner requests a full accounting from the United States of America, and prays judgment in favor of the Navajo Tribe of Indians against the United States of America in an amount to be determined by the fair value of the lands wrongfully taken from petitioner, plus fair and

honorable rectification of, and compensation for, the various breaches, defections, wrongs, departures from standards of fair and honorable dealings, and violations of the duties of respondent as guardian, all as enumerated and described herein, less counterclaims and offsets, if any, together with interest from the respective dates due, at rates to be determined by law, and for the costs of this action, together with such other, further, and general relief as to the Commission may seem just and warranted.

NORMAN M. LITTELL,
S. KING FUNKHOUSER,
RUFUS G. KING, JR.,
Attorneys for Plaintiff,
1422 F Street, N. W.,
Washington 4, D. C.

APPENDIX A

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE NAVAJO TRIBE OF INDIANS

(Ratified by the Senate September 9, 1850;
Proclaimed by the President September 24, 1850)

The following acknowledgements, declarations, and stipulations, have been duly considered, and are now solemnly adopted and proclaimed by the undersigned: that is to say, John M. Washington, Governor of New Mexico, and Lieutenant-Colonel commanding the troops of the United States in New Mexico, and James S. Calhoun, Indian agent, residing at Santa Fe, in New Mexico, representing the United States of America, and Mariano Martinez, Head Chief, and Chapitone, second Chief, on the part of the Navajo tribe of Indians.

I. The said Indians do hereby acknowledge that, by virtue of a treaty entered into by the United States of America and the United Mexican States, signed on the second day of February, in the year of our Lord eighteen hundred and forty-eight, at the city of Guadalupe Hidalgo, by N. P. Trist, of the first part, and Luis G. Cuevas, Bernardo Couto, and Mgl Atristain, of the second part, the said tribe was lawfully placed under the exclusive jurisdiction and protection of the government of the said United States, and that they are now, and will forever remain, under the aforesaid jurisdiction and protection.

II. That from and after the signing of this treaty, hostilities between the contracing parties shall cease, and perpetual peace and friendship shall exist; the said tribe hereby solemnly covenanting that they will not associate with, or give countenance or aid to, any tribe or band of Indians, or other persons or powers, who may be at any time at enmity with the people of the said United States; that they will remain at peace, and treat honestly and humanely all persons and powers at peace with the said States; and all cases of aggression against said Navajoes by citizens or others of the United States, or by

other persons or powers in amity with the said States, shall be referred to the government of said States for adjustment and settlement.

III. The government of the said States having the sole and exclusive right of regulating the trade and intercourse with the said Navajoes, it is agreed that the laws now in force regulating the trade and intercourse, and for the preservation of peace with the various tribes of Indians under the protection and guardianship of the aforesaid government, shall have the same force and efficiency, and shall be as binding and as obligatory upon the said Navajoes, and executed in the same manner, as if said laws had been passed for their sole benefit and protection; and to this end, and for all other useful purposes, the government of New Mexico, as now organized, or as it may be by the government of the United States, or by the legally constituted authorities of the people of New Mexico, is recognized and acknowledged by the said Navajoes; and for the due enforcement of the aforesaid laws, until the government of the United States shall otherwise order, the territory of the Navajoes is hereby annexed to New Mexico.

IV. The Navajo Indians hereby bind themselves to deliver to the military authority of the United States in New Mexico, at Santa Fe, New Mexico, as soon as he or they can be apprehended, the murderer or murderers of Micente Garcia, that said fugitive or fugitives from justice may be dealt with as justice may decree.

V. All American and Mexican captives, and all stolen property taken from Americans or Mexicans, or other persons or powers in amity with the United States, shall be delivered by the Navajo Indians to the aforesaid military authority at Jemez, New Mexico, on or before the 9th day of October next ensuing, that justice may be meted out to all whom it may concern; and also all Indian captives and stolen property of such tribe or tribes of Indians as shall enter into a similar reciprocal treaty, shall, in like manner, and for the same purposes, be turned over to an authorized officer or agent of the said States by the aforesaid Navajoes.

VI. Should any citizen of the United States or other person or persons subject to the laws of the United States, murder, rob, or otherwise maltreat any Navajo Indian or Indians, he or they shall be arrested and tried, and, upon conviction, shall be subjected to all the penalties provided by law for the protection of the persons and property of the people of the said States.

VII. The people of the United States of America shall have free and safe passage through the territory of the aforesaid Indians, under such rules and regulations as may be adopted by authority of the said States.

VIII. In order to preserve tranquility, and to afford protection to all the people and interests of the contracting parties, the government of the United States of America will establish such military posts and agencies, and authorize such trading-houses, at such time and in such places as the said government may designate.

IX. Relying confidently upon the justice and the liberality of the aforesaid government, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Navajoes that the government of the United States shall, at its earliest convenience, designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

X. For and in consideration of the faithful performance of all the stipulations herein contained, by the said Navajo Indians, the government of the United States will grant to said Indians such donations, presents, and implements, and adopt such other liberal and humane measures, as said government may deem meet and proper.

XI. This treaty shall be binding upon the contracting parties from and after the signing of the same, subject only to such modifications and amendments as may be adopted by the government of the United States; and, finally, this treaty is to receive a liberal construction, at all times and in all places,

to the end that the said Navajo Indians shall not be held responsible for the conduct of others, and that the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians.

In faith whereof, we, the undersigned, have signed this treaty, and affixed thereunto our seals, in the valley of Cheille, this the ninth day of September, in the year of our Lord one thousand eight hundred and forty-nine.

J. M. WASHINGTON, [L.S.]
Brevet Lieutenant-Colonel Commanding

JAMES S. CALHOUN, [L.S.]
Indian Agent, residing at Santa Fe.

MARIANO MARTINEZ, his x mark, [L.S.]
Head Chief.

CHAPITONE, his x mark, [L.S.]
Second Chief.

J. L. COLLINS.
JAMES CONKLIN.
LORENZO FORCE.

ANTONIO SANDOVAL, his x mark.
FRANCISCO JOSTO, his x mark.
Governor of Jemez.

Witnesses—

H. L. KENDRICK, *Brevet Major, U.S.A.*
J. N. WARD, *Brevet 1st Lieut. 3d Inf'ry.*
JOHN PECK, *Brevet Major U.S.A.*
J. F. HAMMOND, *Assistant Surg'n U.S.A.*
H. L. DODGE, *Capt. comd'g Eut. Rg's.*
RICHARD H. KERN.
J. H. NONES, *Second Lieut. 2d Artillery.*
CYRUS CHOICE.
JOHN H. DICKERSON, *Second Lieut. 1st Art.*
W. E. LOVE.
JOHN G. JONES.
J. H. SIMPSON, *First Lieut. Corps Top. Engrs.*

APPENDIX B

TREATY WITH THE NAVAJO INDIANS.
June 1, 1868.

(Ratified July 25, 1868; Proclaimed August 12, 1868)
Articles of a treaty and agreement made and entered into at Fort Sumner, New Mexico, on the first day of June, one thousand eight hundred and sixty-eight, by and between the United States, represented by its commissioners, Lieutenant-General W. T. Sherman and Colonel Samuel F. Tappan, of the one part, and the Navajo nation or tribe of Indians, represented by their chiefs and headmen, duly authorized and empowered to act for the whole people of said nation or tribe, (the names of said chiefs and headmen being hereto subscribed,) of the other part, witness:—

ARTICLE I. From this day forward all war between the parties to this agreement shall forever cease. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws, and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under

this treaty, or any others that may be made with the United States. And the President may prescribe such rules and regulations for ascertaining damages under this article as in his judgment may be proper; but no such damage shall be adjusted and paid until examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss whilst violating, or because of his violating, the provisions of this treaty or the laws of the United States, shall be reimbursed therefor.

ARTICLE II. The United States agrees that the following district of country, to wit: bounded on the north by the 37th degree of north latitude, south by an east and west line passing through the site of old Fort Defiance, in Canon Bonito, east by the parallel of longitude which, if prolonged south, would pass through old Fort Lyon, or the Ojo-de-oso, Bear Spring, and west by a parallel of longitude about 109° 30′ west of Greenwich, provided it embraces the outlet of the Canon-de-Chilly, which canon is to be all included in this reservation, shall be, and the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employes of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

ARTICLE III. The United States agrees to cause to be built, at some point within said reservation, where timber and water may be convenient, the following buildings: a warehouse, to cost not exceeding twenty-five hundred dollars; an agency building for the residence of the agent, not to cost exceeding three thousand dollars; a carpenter shop and blacksmith shop, not to cost exceeding one thousand dollars each; and a schoolhouse and chapel, so soon as a sufficient number of children

can be induced to attend school, which shall not cost to exceed five thousand dollars.

ARTICLE IV. The United States agrees that the agent for the Navajos shall make his home at the agency building; that he shall reside among them, and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by or against the Indians as may be presented for investigation, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

ARTICLE V. If any individual belonging to said tribe, or legally incorporated with it, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding one hundred and sixty acres in extent, which tract, when so selected, certified, and recorded in the "land book" as herein described, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select, and cause to be certified to him or her for purposes of cultivation, a quantity of land, not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate containing a description thereof, and the name of the person selecting it, with a certificate endorsed thereon, that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Navajo Land Book."

The President may at any time order a survey of the reservation, and when so surveyed, Congress shall provide for protecting the rights of said settlers in their improvements, and may fix the character of the title held by each.

The United States may pass such laws on the subject of alienation and descent of property between the Indians and their descendants as may be thought proper.

ARTICLE VI. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English eduction shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.

The provisions of this article to continue for not less than ten years.

ARTICLE VII. When the head of a family shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of two years, he shall be entitled to receive seeds and implements to the value of twenty-five dollars.

ARTICLE VIII. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named under any treaty or treaties heretofore made, the United States agrees to deliver at the agency house on the reservation herein named,

on the first day of September of each year for ten years, the following articles, to wit:

Such articles of clothing, goods or raw materials in lieu thereof, as the agent may make his estimate for, not exceeding in value five dollars per Indian—each Indian being encouraged to manufacture their own clothing, blankets, &c.; to be furnished with no article which they can manufacture themselves. And, in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

And in addition to the articles herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be annually appropriated for a period of ten years, for each person who engages in farming or mechanical pursuits, to be used by the Commissioner of Indian Affairs in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper; and if within the ten years at any time it shall appear that the amount of money needed for clothing, under the article, can be appropriated to better uses for the Indians named herein, the Commissioner of Indian Affairs may change the appropriation to other purposes, but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named, provided they remain at peace. And the President shall annually detail an officer of the army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

ARTICLE IX. In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their reservation, as herein defined, but retain the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may

range thereon in such numbers as to justify the chase; and they, the said Indians, further expressly agree:

1st. That they will make no opposition to the construction of railroads now being built or hereafter to be built across the continent.

2nd. That they will not interfere with the peaceful construction of any railroad not passing over their reservation as herein defined.

3rd. That they will not attack any persons at home or travelling, nor molest or disturb any wagon trains, coaches, mules or cattle belonging to the people of the United States, or to persons friendly therewith.

4th. That they will never capture or carry off from the settlements women or children.

5th. They will never kill or scalp white men, nor attempt to do them harm.

6th. They will not in future oppose the construction of railroads, wagon roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States; but should such roads or other works be constructed on the lands of their reservation, the government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or head man of the tribe.

7th. They will make no opposition to the military posts or roads now established, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

ARTICLE X. No future treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force against said Indians unless agreed to and executed by at least three fourths of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood

or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in article ..... of this treaty.

ARTICLE XI. The Navajos also hereby agree that at any time after the signing of these presents they will proceed in such manner as may be required of them by the agent, or by the officer charged with their removal, to the reservation herein provided for, the United States paying for their subsistence en route, and providing a reasonable amount of transportation for the sick and feeble.

ARTICLE XII. It is further agreed by and between the parties to this agreement that the sum of one hundred and fifty thousand dollars appropriated or to be appropriated shall be disbursed as follows, subject to any conditions provided in the law, to wit:

1st. The actual cost of the removal of the tribe from the Bosque Redondo reservation to the reservation, say fifty thousand dollars.

2nd. The purchase of fifteen thousand sheep and goats, at a cost not to exceed thirty thousand dollars.

3rd. The purchase of five hundred beef cattle and a million pounds of corn, to be collected and held at the military post nearest the reservation, subject to the orders of the agent, for the relief of the needy during the coming winter.

4th. The balance, if any, of the appropriation to be invested for the maintenance of the Indians pending their removal, in such manner as the agent who is with them may determine.

5th. The removal of this tribe to be made under the supreme control and direction of the military commander of the Territory of New Mexico, and when completed, the management of the tribe to revert to the proper agent.

ARTICLE XIII. The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home, and they will

not as a tribe make any permanent settlement elsewhere, reserving the right to hunt on the lands adjoining the said reservation formerly called theirs, subject to the modifications named in this treaty and the orders of the commander of the department in which said reservation may be for the time being; and it is further agreed and understood by the parties to this treaty, that if any Navajo Indian or Indians shall leave the reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges, and annuities conferred by the terms of this treaty; and it is further agreed by the parties to this treaty, that they will do all they can to induce Indians now away from reservations set apart for the exclusive use and occupation of the Indians, leading a nomadic life, or engaged in war against the people of the United States, to abandon such a life and settle permanently in one of the territorial reservations set apart for the exclusive use and occupation of the Indians.

In testimony of all which the said parties have hereunto, on this the first day of June, one thousand eight hundred and sixty-eight, at Fort Sumner, in the Territory of New Mexico, set their hands and seals.

W. T. SHERMAN,
Lt. Gen'l, Indian Peace Commissioner.

S. F. TAPPAN,
Indian Peace Commissioner.

BARBONCITO, *Chief.*	his x mark.
ARMIJO.	his x mark.
DELGADO.	
MANUELITO.	his x mark.
LARGO.	his x mark.
HERRERO.	his x mark.
CHIQUETO.	his x mark.
MUERTO DE HOMBRE.	his x mark.
HOMBRO.	his x mark.
NARBONO.	his x mark.
NARBONO SEGUNDO.	his x mark.
GANADO MUCHO.	his x mark.

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49a

COUNCIL.

RIQUO.	his x mark.
JUAN MARTIN.	his x mark.
SERGINTO.	his x mark.
GRANDE.	his x mark.
INOETENITO.	his x mark.
MUCHACHOS MUCHO.	his x mark.
CHIQUETO SEGUNDO:	his x mark.
CABELLO AMARILLO.	his x mark.
FRANCISCO.	his x mark.
TORIVIO.	his x mark.
DESDENDADO.	his x mark.
JUAN.	his x mark.
GUEKO.	his x mark.
GUGADORE.	his x mark.
CABASON.	his x mark.
BARBON SEGUNDO.	his x mark.
CABARES COLORADOS.	his x mark.

Attest:

GEO. W. G. GETTY,
Col. 37th Inf'y, Bt. Maj. Gen'l U. S. A.

B. S. ROBERTS,
Bt. Brg. Gen'l U. S. A., Lt. Col. 3d Cav'y.

J. COOPER MCKEE,
Bt. Lt. Col. Surgeon U. S. A.

THEO. H. DODD,
U. S. Indian Ag't for Navajos.

CHAS. MCCLURE,
Bt. Maj. and C. S. U. S. A.

JAMES F. WEEDS,
Bt. Maj. and Asst. Surg. U. S. A.

J. C. SUTHERLAND,
Interpreter.

WILLIAM VAUX,
Chaplain, U. S. A.

51a

APPENDIX D

Special Claims Contract

THIS AGREEMENT, made the 1st day of July, 1968, at Window Rock, Arizona between Raymond Nakai, Chairman of the Navajo Tribal Council, acting on behalf of the Navajo Tribe of Indians (hereinafter designated as the TRIBE), under authority vested in him by Resolution CAP-56-68 of the Navajo Tribal Council adopted on April 24, 1968, attached to and made a part hereof, and Harold E. Mott, Attorney at Law, of Albuquerque, New Mexico, and Window Rock, Arizona (hereinafter designated as the ATTORNEY),

Witnesseth

1. *Employment.* The TRIBE has certain claims pending before the Indian Claims Commission, identified as Docket Numbers 229 (presently consolidated with Docket Nos. 196, 227, 266, 91, 30, 48, 22-D and 22-J), 299, 353 and 89 (hereinafter referred to as "the claims"), which were filed by an attorney formerly retained by the TRIBE as claims counsel who did not complete the work of their presentation and disposition. The TRIBE, desirous that said claims be diligently prosecuted to judgment or other appropriate conclusion, hereby retains and employs the ATTORNEY for a period of four (4) years, commencing on July 1, 1968, to advise and represent the TRIBE in connection with such claims, pursuant to the provisions of Section 2103 of the Revised Statutes (Section 81, Title 25, United States Code), as amended.

2. *Duties of the ATTORNEY.* It shall be the duty of the ATTORNEY to diligently prosecute the claims and to exert his best efforts to satisfactorily conclude them within the term of this contract. He shall employ such other persons as may be required to carry out his obligations hereunder, *provided* that the cost of secretarial services and the salary

of an attorney, hired with the approval of the TRIBE to assist with the prosecution of the claims shall be deemed an expense incurred under Paragraph 4(A) of this contract.

3. *Compensation.* In consideration for the successful prosecution and conclusion of the claims, the ATTORNEY shall receive ten percent (10%) of any and all sums recovered for the benefit of the TRIBE. It is understood that said compensation shall be wholly contingent upon a recovery for the benefit of the TRIBE and shall be shared by the ATTORNEY and other attorneys, if any, determined to be entitled to a part thereof.

4. *Expenses.*

A. The ATTORNEY shall be entitled to reimbursement of the following expenses, the total of which shall be reimbursed to the TRIBE from any portion of a tribal recovery allocated to attorney fees: the cost of hiring an attorney, with the approval of the TRIBE, who shall devote such time as shall be necessary to secure the expeditious prosecution and conclusion of the claims within the period contemplated hereunder, to be compensated at the rate of twenty-five dollars ($25.00) per hour if he shall expend less than six hundred (600) hours per year, and fifteen thousand dollars ($15,000) per annum if he shall work six hundred (600) or more hours per year; cost of local secretarial service up to six thousand dollars ($6,000) a year, it being understood that any amounts paid for such service in excess of this amount including salary or bonuses shall be paid in their entirety by ATTORNEY; three-fourths (3/4) cost of office not to exceed three thousand dollars ($3,000) expense to TRIBE a year; and three-fourths (3/4) of all miscellaneous expenses included in daily office maintenance including, but not limited to supplies, postage, local telephone, stamps and like expenses, the cost to the TRIBE not to exceed five thousand dollars ($5,000) a year. Included in this figure shall be furniture not furnished by ATTORNEY. Such additional

furniture and equipment shall be furnished by TRIBE and the ownership thereof shall be in and remain in the TRIBE and become its exclusive property.

B. The ATTORNEY shall also be reimbursed for all necessary and proper expenses incurred in connection with the performance of his duties hereunder, including, but not limited to travel expenses (including mileage at the rate of ten cents (10¢) per mile when privately-owned automobile is used), long distance telephone and telegraph tolls; taxi fares, notary fees, costs of printing, reproducing and purchasing documents, and cost of stenographic services incurred while in travel status, *provided* that the ATTORNEY shall not be deemed to be in travel status when in or traveling between the claims office and Window Rock, Arizona. Said expenses shall not be reimbursed to the TRIBE by the ATTORNEY and shall not exceed the sum of twelve thousand dollars ($12,000) per year, except for such additional amounts as may be authorized by the TRIBE and approved by the Secretary of the Interior or his authorized representative (hereinafter designated as the SECRETARY).

C. The expenses enumerated herein with the exception of the salary of the secretary shall be reimbursed to the ATTORNEY only upon presentation of itemized and verified statements approved by the SECRETARY or his designee and the TRIBE, and accompanied by proper vouchers evidencing the actual expenditure thereof, except for expenditures where no vouchers are issued, such as tips, taxi cab fares, meals and like expenditures. The salary of the secretary shall be paid out of the fund established for claims expenses on IBM payroll cards.

D. Payment of expenses and compensation under this contract shall be contingent upon the availability of tribal funds or appropriation by the Congress of the United States of tribal funds held to the credit of the TRIBE.

5. *Reports.* Within twelve (12) months of the date of this contract, the ATTORNEY shall furnish a written report to the TRIBE and SECRETARY upon the status of the claims, setting forth the amount and nature of each claim, the issues of fact and law involved, an assessment of the work completed and remaining to be done, an estimate of the time that will be required to secure final judgment or other appropriate disposition, and a program for its prosecution. Such report shall be supplemented each six (6) months throughout the term of this contract.

6. *Compromises and Settlements.* Any compromise, settlement or other adjustment of the claims shall be subject to the approval of the TRIBE and the SECRETARY.

7. *Assignments.* No assignment of the obligations of this contract, in whole or in part, and no assignment or encumbrance of any interest in the compensation to be paid herein shall be made without the consent, previously obtained, of the TRIBE and the SECRETARY; any such assignment or encumbrance in violation of the provisions of this paragraph, shall operate to terminate this contract. In the event of such termination, no person having any interest in this contract or in the compensation provided hereunder shall be entitled to any compensation whatsoever for services rendered subsequent to the date of termination.

55a

8. *Termination.* This contract may be terminated at any time by either party upon ninety (90) days' written notice to the other party and the SECRETARY. This contract may also be terminated for cause by the SECRETARY after a hearing on reasonable notice. If the SECRETARY finds that the interests of the TRIBE so require, he may suspend this contract and the payment of all amounts due the ATTORNEY hereunder, pending a hearing which shall be held without unreasonable delay.

/s/ RAYMOND MAKAI
Raymond Makai
Chairman of the Navajo Tribal Council

/s/ HAROLD E. MOTT
Harold E. Mott

Approved this 21st day of November 1968 pursuant to letter dated November 15, 1968, signed by Assistant Secretary Anderson.

/s/ GRAHAM HOLMES
Graham Holmes
Area Director

56a

August 22, 1968

Memorandum to Contract Files for Navajo Cases in Dockets Numbered: 69, 229, 299, 353

From: Donald Hyde

Mr. Harold E. Mott, General Counsel for the Navajo Tribe of Indians, was elected Claims Attorney for the Navajo Tribe by the Navajo Tribal Council on April 25, 1968 and a contract of employment between Mr. Mott as such claims attorney and the Navajo Tribe was executed by the parties on June 6, 1968. This contract of employment, however, was disapproved by the Department of the Interior. An Assistant Secretary of the Interior advised Mr. Mott and the Tribe, by letter, of certain amendments that Mr. Mott and the Tribe could make that would make the contract acceptable to the Department, so Mr. Lovell of the Bureau of Indian Affairs advised the Commission today (by telephone). Mr. Lovell thought it might be a matter of a few weeks before the contract will be eventually approved (after appropriate amendments are made in it).

57a

APPENDIX E

BEFORE THE INDIAN CLAIMS COMMISSION

No. 69

THE NAVAJO TRIBE OF INDIANS, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Defendant*

First Amended Petition

To The Honorable Commissioners
Of The Indian Claims Commission:

The petition is amended by deleting paragraphs 10, 16, 19, 21, 23, 25 and 29, thereby withdrawing from consideration herein the first, second, third, fourth, fifth, sixth and eighth claims.

Respectfully submitted,

/s/ HAROLD E. MOTT
Harold E. Mott
First National Bank Bldg.—East
Suite 304
5301 Central Avenue, N.E.
Albuquerque, New Mexico 87108

Claims Attorney,
Navajo Tribe of Indians
Attorney of Record

59a

APPENDIX F

BEFORE THE INDIAN CLAIMS COMMISSION

Docket Nos. 69, 299 and 353

THE NAVAJO TRIBE, *Plaintiff*,

v.

THE UNITED STATES OF AMERICA, *Defendant*.

Decided: January 23, 1975

Appearances:

William C. Schaab, Attorney for the Plaintiff.

Dean K. Dunsmore, with whom was Assistant Attorney General,
Wallace H. Johnson, Attorneys for Defendant.

Opinion of the Commission

Kuykendall, Chairman, delivered the opinion of the Commission.

The Commission has before it plaintiff's motion of July 1, 1974, to amend the petitions in Dockets 69, 299 and 353, defendant's response thereto, and plaintiff's reply to the response. In addition, we have before us defendant's motion for final judgment, and plaintiff's response. Since these motions deal with related issues, they will be decided together.

Plaintiff originally asserted eight claims for relief in its petition in Docket 69, which was filed on July 11, 1950. Each claim contained allegations of certain facts and wrongdoings, and each was followed by a paragraph stating plaintiff's legal conclusions arising from the preceding allegations. Claims 1 through 6 and claim 8 pertain to various treaties and agreements between the parties which were

concluded in the nineteenth century. Claim 7 is a request for a general accounting.[1]

In an amended petition, filed October 1, 1969, plaintiff deleted certain of the conclusory paragraphs of its original petition, and stated that it was thereby withdrawing from consideration claims 1 through 6 and claim 8. However, it did not delete any of the allegations of fact supporting the claims.

Plaintiff's motion to amend which is now before us was filed following a change of counsel for plaintiff in September 1973. This motion proposes to reformulate the conclusory paragraphs of claims 1 through 6 of the original petition and it seeks permission to amend the seventh claim by adding thereto a prayer for supplementation of defendant's 1961 accounting report. Plaintiff also requests permission to amend the petitions in all three dockets by including a request that defendant's accounting report be extended beyond August 13, 1946, as to wrongs occurring before that date and continuing after it.

Plaintiff's Motion to Reformulate Claims 1 Through 6

Defendant contends that as a result of plaintiff's amended petition of 1969, the proposed reformulated claims have nothing to which they can relate back, and argues that as a consequence plaintiff's motion to amend must be denied. However, as we have observed above, plaintiff's first amended petition, which purported to withdraw seven of plaintiff's claims,[2] did not delete the allegations of fact

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[1] Since Dockets 299 and 353 also present accounting claims, and defendant filed one accounting report for all three dockets, we consolidated the dockets. 31 Ind. Cl. Comm. 40 (1973). For a history of the dockets see our discussion therein.

[2] The attorney contract in effect with the Navajo Tribe at the time of the amended petition of 1969 required that any adjustment of plaintiff's claims by plaintiff's attorneys would be subject to

which were the substance of those claims. Moreover, plaintiff's seventh claim, which clearly remained after the amended petition of 1969 was filed, stated that plaintiff "restates and reaffirms each and every allegation of fact" of the original petition.

Therefore, since plaintiff's proposed reformulated claims are based on allegations of fact which have never been withdrawn, we will grant plaintiff's motion of July 1, 1974, to amend the petitions.

Defendant's Motion for Final Judgment

Defendant's motion for dismissal of claims 1 through 6 and claim 8 in Docket 69 is grounded on plaintiff's purported withdrawal of these claims by the filing of its amended petition in 1969.

The newly amended petition which we are permitting to be filed will supersede the 1969 amended petition which is the petition to which defendant's motion is directed. For this reason, as well as the reasons set forth above for granting plaintiff's instant motion to reformulate its claims, we will deny defendant's motion for final judgment as to the claims 1 through 6 and claim 8.

Plaintiff's Motion to Amend Seventh Claim

This motion requests permission to amend the seventh claim in Docket 69 by adding a prayer that further information be supplied in the accounting report. Defendant's response to plaintiff's motion does not address itself to this issue.

Plaintiff's motion is not in accord with the proper procedure in accounting cases. *See, e.g., Blackfeet and Gros*

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the approval of the tribe. The record does not indicate that this requirement, which would presumably be applicable to an amendment withdrawing several claims, was met.

Ventre Tribes v. *United States,* Dockets 279-C and 250-A, 32 Ind. Cl. Comm. 65 (1973), and cases cited therein; *Sioux Tribe* v. *United States,* Docket 114 *et al.,* 12 Ind. Cl. Comm. 541 (1963). After defendant has filed its accounting report, amendments to plaintiff's petition are usually no longer necessary. *Ft. Peck Indians* v. *United States,* Docket 184, 34 Ind. Cl. Comm. 24, 55 (1974).

The appropriate procedure is for plaintiff to file amended or supplemental exceptions to defendant's accounting report, or to move for a supplemental accounting. *See, e.g., Sioux Tribe* v. *United States,* Docket 119, 34 Ind. Cl. Comm. 230 (1974) (discussions of exceptions No. 3 and No. 13); *Blackfeet and Gros Ventre Tribes, supra,* at 67. Plaintiff has already indicated its intention of filing supplemental exceptions to the accounting. We therefore will deny plaintiff's motion. We further discuss below, the matter of supplemental accountings.

Plaintiff's Motion for Post-1946 Accounting

Finally, plaintiff requests an amendment which would contain a request for a supplemental accounting in all three dockets from August 13, 1946, to date. As we have noted above, such a motion is not now appropriate.

Furthermore this question was raised by plaintiff previously herein, and has been discussed and disposed of by the Commission. See 31 Ind. Cl. Comm. at 53. As we stated there, the United States will be ordered to supplement its accounting beyond August 13, 1946, only after it has been disclosed that defendant was guilty of pre-1946 wrongdoings which continued after that date.

For the above reasons plaintiff's motion to amend the petitions in all three dockets so that they include requests for an accounting from August 13, 1946, to date will be denied without prejudice.

63a

Future Proceedings

Defendant has included in its response to plaintiff's motion a request that plaintiff be precluded from filing further exceptions to the accounting report. Defendant apparently has in mind a motion filed by plaintiff on December 17, 1973, which requested six months to file supplemental exceptions. None have yet been filed.

Since present counsel for plaintiff now has had adequate time to become familiar with these dockets and the applicable law, he should be able to act promptly. We will therefore grant plaintiff until February 19, 1975, within which to file any amended or supplemental exceptions to defendant's accounting report.

Plaintiff's claims 1 through 6, and claim 8, in Docket 69 are not accounting matters and they therefore will be separated from the consolidated accounting claims in Dockets 69, 299 and 353.

/s/ JEROME K. KUYKENDALL
Jerome K. Kuykendall, Chairman

We concur:

/s/ JOHN T. VANCE
John T. Vance, Commissioner

/s/ RICHARD W. YARBOROUGH
Richard W. Yarborough, Commissioner

/s/ MARGARET H. PIERCE
Margaret H. Pierce, Commissioner

/s/ BRANTLEY BLUE
Brantley Blue, Commissioner

65a

APPENDIX G

IN THE UNITED STATES COURT OF CLAIMS

TRIAL DIVISION

No. 69

(Claims 1 through 6 and Claim 8)

(Liability Claims)

(Filed January 23, 1978)

THE NAVAJO TRIBE OF INDIANS

v.

THE UNITED STATES

Indians; relation back of petition amendments to avoid statute of limitations bar; estoppel through treaty violations by tribe; trespass of aboriginal lands; fair and honorable dealings coverage; specificity requirements for petition; fiduciary relationship; individual versus tribal claims; lack of jurisdiction to invalidate treaty; jurisdiction to revise treaty; educational breach of treaty; prior adjudication as to mineral resources; facilities breach of treaty; Act restricted to monetary relief.

William C. Schaab, attorney of record, for plaintiff. *Rodney, Dickason, Sloan, Akin & Robb, P.A.,* of counsel.

Dean K. Dunsmore, with whom was *Assistant Attorney General Peter R. Taft,* for defendant.

66a

Opinion on Motion to Dismiss or for More Definite Statement *

BERNHARDT, *Trial Judge:* All briefs on the defendant's combined motion were filed with the Indian Claims Commission and were pending without ruling when jurisdiction of the case was transferred to the Court of Claims on December 29, 1976, pursuant to Pub. L. 94-465 (90 Stat. 1990). Upon transfer to the court the case was assigned to the trial division for initial action, and by it referred to the above trial judge before whom the motion now awaits ruling.

The dual purpose motion is addressed to the Second Amended Petition filed April 12, 1976. In the introduction of its specific responses thereto, the plaintiff contends that the defendant's motion is dilatory and proscribed by the Commission's General Rules of Procedure (GRP) 6(c) providing that "Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used." The plaintiff submits that the defendant should first file its answer to the petition and thereafter test out matters of sufficiency of pleadings by means of a motion for summary judgment. In the discussion which follows the Rules of this court shall control as it is the current forum, although in respects here relevant our Rules, the GRP, and the Federal Rules of Civil Procedure (FRCP) are identical.

In reply to the plaintiff's response the defendant contends that GRP 6(c), counterpart of our Rule 31(b) and FRCP 7(c), is not applicable, and that the defendant's motion is not dilatory.

Our Rule 31(b), copied from FRCP 7(c), is not applicable. FRCP 7(c) (and by analogy our Rule 31(b)), was designed to abolish preexisting technical rules by which certain defenses were formerly raised. Our Rule 38(b) (paralleling FRCP 12(b) and GRP 11(b)) permits certain

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* The opinion and conclusion of law are submitted pursuant to Rule 54(a). The necessary facts are stated in the opinion.

defenses to be made by motion filed prior to the filing of an answer, including lack of jurisdiction over the subject matter and failure to state a cause of action for which relief can be granted. Our Rule 38(e), mirroring FRCP 12(e) and GRP 11(e), permits a pleader to move for a more definite statement of an ambiguous or vague antecedent pleading so that a suitable response may be framed.

From the standpoint of the rules, therefore, the fact that no answer has yet been filed to plaintiff's Second Amended Petition presents no technical bar to the filing of defendant's motion, provided the motion itself is not dilatory, which the plaintiff maintains but the circumstances negate. As originally filed in 1950 the petition contained eight claims. By permission of the Commission no answer was filed due to the intervention of accounting procedures, a protracted siege of motions, a deferred intention to file an Amended Petition, and finally the filing on October 1, 1969, of a First Amended Petition which withdrew the prayers for relief in all of the original eight claims except the accounting claim. Defendant answered the First Amended Petition promptly on November 4, 1969. New counsel for plaintiff was permitted on January 23, 1975, over objection of defendant, to file a Second Amended Petition "reformulating" the previously withdrawn non-accounting claims First through Sixth (35 Ind. Cl. Comm. 307 (1975)). The Second Amended Petition itself was not filed until April 12, 1976, due to much intervening activity in the case, including the defendant's motion of April 1, 1975, to the Commission for certification of this issue to this court, which was denied by the Commission's order of July 9, 1975. (36 Ind. Cl. Comm. 215 (1975).) Instead of filing an answer to the Second Amended Petition the defendant elected to file its present motion on June 3, 1976.

The plaintiff alleges that the pending motion is defendant's first effort to attack the legal sufficiency of non-accounting claims First through Sixth, and the Eighth

Claim, which were made in the original petition and are resurrected in the Second Amended Petition, after a 5½ year absence, but the record shows otherwise. On July 9, 1963, the defendant challenged the sufficiency of the non-accounting claims in a motion to sever or dismiss them but, after plaintiff's motion for an extension of time to respond, the Commission on August 23, 1963, denied defendant's motion without prejudice to its later refiling. The 27-year voyage of the case from there to here has been protracted but not quiescent. A glance at the voluminous docket entries, and the mounting pile of pleadings does not indicate that defendant has been dilatory in restating in its present motion a challenge to legal sufficiency whose gist was raised before but deferred.

Overview of Pleadings

At the opening of each of the seven claims following the First Claim in the Second Amended Petition (hereafter constantly termed "the petition") the plaintiff formally restates and reaffirms by reference all of the allegations in the paragraphs supporting each of the preceding claims, but not of course the prayers for relief in those preceding claims, with one exception. While each numbered claim in the petition has at the top a parenthetical title ostensibly denominating the scope of the particular claim (the titles are summarized in a table of contents accompanying the petition), in actuality there is much duplication and overlapping of allegations in the successive claims. Some of the claims pray for relief which infringes on the relief demanded or available in docket 229 (still pending before the Commission and involving alleged undercompensation for aboriginal lands ceded by plaintiff to the United States under the Treaty of 1868), or to be dealt with separately in the accounting claims now before the court in dockets 299, 353, and the Seventh Claim of docket 69. The extent of overlap and duplication with docket 229 and with the

separated accounting claims (dockets 299, 353, and the Seventh Claim of docket 69) will be discussed in considering the defendant's motion to dismiss particular claims on that ground.

The eight claims in the petition collectively allege about seven major causes of action involving alleged violations of plaintiff's 1850 and 1868 treaties,[1] title to aboriginal and reservation lands under the 1850 Treaty and reservation lands under the 1868 Treaty, coerced negotiation of 1868 Treaty, mistreatment of the Indians in violation of fair and honorable dealings and guardianship standards in various ways (sanctioned or encouraged trespassing by third parties, denial of guarantees relating to education, health, and welfare, removal of minerals, agricultural assistance, breach of treaty obligation to construct facilities, breach of alleged agreement to return homelands as compensation for scout services rendered in 1886 War against the Apaches, damage to agricultural and grazing land), and the demand in the Seventh Claim for accounting. The First through Sixth Claims are the vital claims to consider at this time, since the Seventh Claim relating to accounting is to be separately considered with the accounting claims constituting dockets 299 and 353 (also before the court on transfer from the Commission); the Eighth Claim was purportedly dismissed by the Commission yet physically reappears in the latest petition without Commission permission being visibly requested.[2] However, some mention will be made of the Sev-

[1] Treaty of September 9, 1849, 9 Stat. 974, 2 Kappler 583, ratified September 24, 1850 (hereafter "Treaty of 1850"). Treaty of June 1, 1868, 15 Stat. 667, 2 Kappler 1015, ratified July 25, 1868 (hereafter "Treaty of 1868").

[2] In the discussion under Part XVIII of defendant's motion, *infra*, which moves the dismissal of plaintiff's Eighth Claim, we discuss in detail the confusing procedural posture of the Eighth Claim, which survives in the petition due to the Commission's gratuitous ruling (36 Ind. Cl. Comm. 108 (1975)), despite the plaintiff's apparent abandonment.

enth and Eighth Claims in this opinion to the extent they are addressed by the defendant's motion.

Some of the series of eighteen roman numeral Parts of defendant's motion to dismiss present several separate grounds for the dismissal of each or parts of each of the eight claims in the petition. Thus, Part I of defendant's motion seeks dismissal of all seven non-accounting claims for procedural reasons. Parts II through IV seek dismissal or a more definite statement as to the First Claim. Parts V through VII are addressed to the Second Claim, Parts VIII and IX to the Third Claim, Parts X and XI to the Fourth Claim, Parts XII through XIV to the Fifth Claim, Parts XV and XVI to the Sixth Claim, Part XVII to the Seventh Claim, and Part XVIII to the Eighth Claim. There are collectively about eighteen grounds urged for dismissal, but no useful purpose would be served by describing them in general terms at this point since they will be explained in detail as each Part of defendant's motion unfolds.

Part I

In Part I of its motion the defendant requests dismissal of all but the Seventh Claim of plaintiff's petition because the other claims were voluntarily withdrawn from the original petition by the First Amended Petition and then, with sanction of the Commission, by its order of January 23, 1975 (35 Ind. Cl. Comm. 315), realleged in the latest petition as previously noted. Defendant claims that they are barred by the applicable statute of limitations, 25 U.S.C. § 70k, which requires such claims to be filed by August 13, 1951. To this extent the motion filed June 3, 1976, constitutes, in effect, defendant's belated motion for reconsideration by the Commission of its order of January 23, 1975, *supra*. The plaintiff responds that GRP 33(a) precludes a motion for rehearing filed beyond the 30 days allowed in that rule. GRP 33(a) is directed to rehearing of the Commission's "conclusions on its findings of fact", and thus does

not literally apply to a ruling on a question of law such as propriety of permitting petition amendments to reallege previously withdrawn claims that might otherwise be time-barred. However, GRP 33(b) applies to rehearing on errors of law, and it clearly makes defendant's motion untimely.

Despite that fact, we shall explore the grounds. The reasons given by the Commission for permitting reinstatement of the withdrawn claims were two: (1) the First Amended Petition withdrew only the prayers for relief and left standing the factual averments supporting the withdrawn prayers; (2) the Seventh Claim relating to accounting, which was left undisturbed in the First Amended Petition, formally restated and reaffirmed the allegations of fact in the other claims in the original petition. Hence, ruled the Commission, "since plaintiff's proposed reformulated claims [in the latest petition] are based on allegations of fact which have never been withdrawn, we will grant plaintiff's motion of July 1, 1974, to amend the petition." This despite the earlier recognition by the Commission that all non-accounting claims First through Sixth, and the Eighth had been withdrawn. 31 Ind. Cl. Comm. 40, 41 (1973).

At the request of the trial judge for clarification, the parties have filed supplemental briefs as to Part I of Defendant's Motion to Dismiss, in which the circumstances of the withdrawal and later reinstatement of the non-accounting claims are explored and authorities are cited to support competing views as to the validity of the Commission's authorization for the reinstatement of the withdrawn claims by allowing the filing of the latest petition.

The following facts are stated by plaintiff: The resignation of plaintiff's original counsel (Mr. Littell) on February 20, 1967, was followed on November 14, 1967, by the filing of defendant's motion to require plaintiff to break down the original petition into separate petitions so as to provide greater specificity in describing the claims or, in the alternative, to dismiss the petition. At that time plaintiff had no

counsel and did not have new counsel to succeed Mr. Littell until on or about November 21, 1968, when Harold Mott, Esquire, was engaged under contract as plaintiff's counsel. In the meantime defendant filed on March 11, 1968, a motion to dismiss for failure to prosecute which, at the instance of Mr. Mott, was denied by Commission order of December 23, 1968. Mr. Mott sought an extension of time to respond to defendant's motion of November 14, 1967, and was on December 23, 1968, given until September 30, 1969, to file an amended petition, which was the request made by him in his opposition to defendant's motion to dismiss for want of prosecution.

For reasons which are not entirely clear, but allegedly related to Mr. Mott's inability to obtain access to Mr. Littell's records, plus the pressure of time and dearth of resources, instead of making the claims of the original petition more specific by dividing them into separate petitions as defendant had requested, or in some other fashion, Mr. Mott on October 1, 1969, filed a First Amended Petition which withdrew the prayers for relief in all non-accounting claims First through Sixth, and the Eighth, in the original petition. With this the defendant allowed its motion of November 14, 1967, to lapse without action, as though moot, which indeed it seemed to be at that juncture.

Neither the reason nor authorization for Mr. Mott's action in withdrawing all non-accounting claims is explained in the record. Speculatively, in part it may have been due to Mr. Mott's realization that the major demands for relief in docket 69 duplicated demands in docket 229. (Docket 229 has been retained by the Indian Claims Commission and is in the concluding phases of determination.) According to the Commission (35 Ind. Cl. Comm. 307 (1975)), the record does not indicate whether Mr. Mott had met the requirement of his attorney contract with the tribe that any adjustment of its claim by counsel (such as voluntary withdrawal of previously pleaded claims) would be subject to tribal

approval. The defendant had full notice of Mr. Mott's contract with the tribe, and thus is charged with knowledge of the extent or absence of his authority thereunder to withdraw claims without tribal approval. From this the plaintiff contends that defendant is estopped from relying on the acts of an agent (Mr. Mott) in withdrawing claims without tribal approval when it (the defendant) knew that the acts were beyond the scope of Mr. Mott's agency powers, if in fact they were.

The defendant contends that the Commission erroneously permitted the reassertion of the withdrawn claims by the plaintiff filing a Second Amended Petition long after the claims had been barred by the statute of limitations expiring August 13, 1951, per 25 U.S.C. § 70k. In its Supplemental Response the plaintiff relies on the recognized policy of liberality in permitting amendments to petitions under the Indians Claims Commission Act, citing *United States* v. *Lower Sioux Indian Community in Minn.*, 207 Ct. Cl. 492, 519 F. 2d 1378 (1975). There the court upheld the Commission in allowing an amendment adding to a petition claims for the taking of land to a claim for a general accounting, even after a stipulation of settlement as to all claims except the accounting claim had been entered into. The court's action was based upon GRP 13(c) which, consistent with the statute, "requires the test of notice if circumvention of a time limitation is to be permitted on the theory of relation back. In fact ,the rule defines that notice, permitting 'relation back', is present only if the amendment arose out of the same 'conduct, transaction, or occurrence' as presented in the original pleadings." *Id.*, at 503. The court felt that the original petition provided the requisite notice of the enlarged claim. See also *Snoqualmie Tribe of Indians* v. *United States,* 178 Ct. Cl. 570, 372 F.,2d 951 (1967), *United States* v. *Northern Paiute Nation,* 183 Ct. Cl. 321, 393 F. 2d 786 (1968), and *United States* v. *Northern Paiute Nation,* 203 Ct. Cl. 468, 490 F. 2d 954 (1974). In the *Snoqualmie*

case the court held that the term "presented" in the limitation statute, 25 U.S.C. § 70k, "should be read liberally to permit an amended pleading to relate back where there is sufficient notice." In the two *Northern Paiute* cases the court allowed second and third amendments to the petition to add additional land to the claim area and to demand compensation for the removal of resources. If on the principal of relation back a new party and a new cause of action can be introduced in a case by amendment after expiration of the statutory period for the filing of claims, as in the *Snoqualmie* and *Paiute* cases, there is less reason to deny the revival of original claims that were previously dismissed under the circumstances described in the present case. This is particularly true where, as here, certain of the realleged claims may be intimately related to the subject matter of extant claims for accounting still in process, and to some extent to the claims in docket 229 pending before the Commission, thus providing the requisite notice to meet the relation back principal in GRP 13(c). No real disadvantage to the defendant can be seen in permitting the amendments to survive for the reasons assigned in Part I of the motion.

Part I of the defendant's motion for dismissal is denied on the merits, and not merely because it is untimely.

Mr. RIGGS. That action violated section 6 of the claim attorney's contract—and here I refer to page 54a of exhibit A—which required approval by both the tribe and the Secretary of the Interior for any "compromise, settlement, or other adjustment of the claims."

Although the Secretary had required such a provision in the attorney's contract for the tribe's protection, the Department of Justice neither informed the Secretary of the claims attorney's action nor advised the commission that the Secretary had not approved such action.

I refer here to exhibit A, p. 56A. The Secretary acted under Congress mandate in 25 U.S.C., section 81 to supervise tribal attorney contracts.

Needless to say, the tribe was not aware of that unauthorized amendment of its basic petition to "withdraw" many good and valuable claims. In fact to my knowledge, the attorney never even advised the tribe that he intended to change the tribe's position.

In other cases, such as the overlapping land claim areas of the Jicarilla Apache Tribe and certain Pueblos, the Justice Department objected to an agreement between attorneys that reduced the Jicarilla's claim area because the Secretary had not given his approval.

I refer here to exhibit B, which I would ask be placed in the record.

Senator DECONCINI. Without objection, it will appear in the record at this point.

[Exhibit B follows:]

EXHIBIT B

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 22A

THE JICARILLA APACHE TRIBE OF THE JICARILLA APACHE INDIAN RESERVATION, NEW MEXICO, Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent.

Docket No. 354

THE PUEBLO OF SAN ILDEFONSO, ET AL., Petitioners,

v.

THE UNITED STATES OF AMERICA, Defendant,

Docket No. 355

THE PUEBLO OF SANTO DOMINGO, Petitioner,

v.

THE UNITED STATES OF AMERICA, Defendant.

Docket No. 356

THE PUEBLO OF SANTA CLARA, Petitioner,

v.

THE UNITED STATES OF AMERICA, Defendant.

99-840 O - 82 - 8

Docket No. 357

THE PUEBLO OF TAOS, Petitioner,

v.

THE UNITED STATES OF AMERICA, Defendant.

Docket No. 358

THE PUEBLO OF NAMBE, Petitioner,

v.

THE UNITED STATES OF AMERICA, Defendant.

MOTION TO VACATE STIPULATIONS FILED MAY 4, 1959

Comes now the defendant, by its Assistant Attorney General, and moves this Commission for an order vacating and striking from the record in the above-entitled cases, the stipulations filed by the petitioner in Docket No. 22A on May 4, 1959. This motion is made on the following grounds:

1. Said stipulations diminish the aboriginal claim of the Jicarilla Apaches as set forth in the amended petition on file in Docket No. 22A.

2. The petitioner in Docket No. 22A has presented evidence, by expert testimony, which purports to show the exclusive use and occupancy by the Jicarilla Apaches of the areas which said stipulations now purport to relinquish to other Indian claimants.

3. The said stipulations, being an attempt to adjust a claim alleged and purportedly proved by the Jicarilla Apaches, cannot be adjusted without the consent of the Commissioner of Indian Affairs and the Jicarilla Apache Tribal Council.

4. That the petitioner, during the first hearing in this case, specifically stated that it claimed the areas which it now seeks to relinquish. (Tr. 560).

In support of this motion, defendant states:

1. That by his contract with the Jicarilla Apache Tribe of the Jicarilla Apache Indian Reservation, New Mexico, the attorney for said tribe is prohibited from making any adjustment of any claim pending on behalf of the tribe without the approval of the Commissioner of Indian Affairs.

2. That it appears that the stipulations filed on May 4, 1959 with the Commission are an attempt to make an adjustment of the claim of the Jicarilla Apache Tribe without the approval of the Commissioner of Indian Affairs.

3. That such an attempt on the part of the attorney for the Jicarilla Apache Tribe is an act outside the scope of his employment as more fully appears from his contract of employment on file with the Commission.

4. That neither this Commission nor any court has the power to enlarge the scope of the attorney's employment without the consent of the Jicarilla Apache Tribe and the Commissioner of Indian Affairs.

5. That the stipulations filed on May 4, 1959 purport to do something which the Jicarilla Apache attorney is expressly, by his contract, prohibited from doing without the consent of the Commissioner of Indian Affairs and the Jicarilla Apache Tribe.

6. That the consent of the Commissioner of Indian Affai[illegible] the Jicarilla Apache Tribe not having been given, the said stipulations [illegible] a nullity and should be expunged from the record in these cases.

7. That the letter of the attorney for the petitioner in Docket No. 22A, transmitting the said stipulations, states that said stipulations are based on the best evidence available to the respective claimants, including the Jicarilla Apache Tribe.

8. That heretofore and during the week of December 1, 1958, a partial hearing was held on the Jicarilla Apache claim and at such hearing the petitioner offered the testimony of two expert witnesses, namely Dr. Albert B. Thomas, Historian, and Dr. Frank C. Hibben, Anthropologist.

9. That both Drs. Thomas and Hibben testified that the Jicarillas occupied and exclusively used the areas which the said stipulations now attempt to relinquish to the claimants in Dockets Nos. 354, 355, 356, 357 and 358.

10. That the attorney for the petitioner in Docket No. 22A is repudiating the testimony of his own experts given at the hearings of December 1–5, 1958 when he states that "* * * the best evidence available * * *" shows that his own experts' testimony is not to be relied upon.

11. That the action of the attorney for the petitioner in Docket No. 22A, in repudiating the testimony of his own experts, should certainly be carefully considered by the Commission before allowing stipulations, which in essence repudiate such testimony, to remain in the record of these cases.

Wherefore, defendant requests:

1. That the Commission enter an order directing the stipulations filed by the petitioner in Docket No. 22A on May 4, 1959 be expunged and stricken from the record in these cases.

2. That pursuant to Section 22(a) of the Commission's Rules of Procedure, an oral hearing be held hereon.

Respectfully submitted.

PERRY W. MORTON,
Assistant Attorney General.

WILLIAM H. LUNDIN,
Attorney.

I hereby certify that on the 13 day of May, 1959, one (1) copy of the above and foregoing motion was mailed to each of the attorneys of record in the above-captioned cases as follows:

Docket No. 22A: Guy Martin, Esq., 910 - 17th Street, NW., Washington 6, D.C.

Dockets Nos. 354, 355, 356, 357 and 358: Darwin P. Kingsley, Jr., Esq., 230 Park Avenue, New York 17, N.Y.

WILLIAM H. LUNDIN,
Attorney.

Mr. RIGGS. The Justice Department itself agreed that "the attorney . . . is prohibited from making any adjustment of any claim pending on behalf of the tribe without the approval of the Commissioner of Indian Affairs."

Only after the attorneys obtained the approval of the Commissioner did the Claims Commission act to accept the agreement as valid.

I refer here to Exhibit C, which I ask be placed in the record.

Senator DECONCINI. Without objection, it will be placed in the record at this point.

[Exhibit C follows:]

EXHIBIT C

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 22–A

THE JICARILLA APACHE TRIBE OF THE JICARILLA APACHE INDIAN RESERVATION, NEW MEXICO, Petitioner,

v.

THE UNITED STATES OF AMERICA, Defendant.

Docket No. 357

THE PUEBLO OF TACS, Petitioner,

v.

THE UNITED STATES OF AMERICA, Defendant.

ORDER APPROVING STIPULATION

Coming on for consideration the Stipulation between the attorneys of the parties to the above numbered and entitled causes filed herein on May 4, 1959, which Stipulation has been approved by the Commissioner of Indian Affairs,

as shown by letter dated July 10, 1959, addressed to Martin and Burt, Attorneys at Law, (copy of which is filed with this Commission) ; and the Commission being of the opinion that said Stipulation should be approved ;

It is hereby ordered and directed that said Stipulation be filed as a part of the record in the above causes and that same be and it is hereby in all things allowed and approved.

Dated at Washington, D.C., this 21st day of July, 1959.

EDGAR E. WITT,
Chief Commissioner.
WM. M. HOLT,
Associate Commissioner.

Mr. RIGGS. Although the Navajo Tribe's claims attorney's contract had a provision like the Jicarilla's, the same caution was not observed in the Navajo cases. Instead, the Department of Justice took advantage of our attorney's unauthorized action for the Government's benefit.

In 1974, 5 years after the unauthorized amendment of the petition, after our third and present claims attorney moved to amend the petition to restore to it all of our claims, the Justice Department asked the Indian Claims Commission to enter final judgment dismissing the "withdrawn" claims.

The Commission denied that request because the 1969 amendment had not been approved by the tribe or the Secretary, and a new amendment was allowed to restore all of the claims that had been originally filed before the deadline of August 13, 1951.

The Government then moved to dismiss claims 1 through 6 and claim 8 on the technical ground that they were presented after the 1951 cutoff date.

After transfer of the case to the Court of Claims, the trial judge filed his option in 1978 upholding the Commission's approval of the tribe's revised petition.

But the Justice Department appealed to the court, and on June 13, 1979, the court dismissed claims 1 through 6 and claim 8.

The court held that the attorney's contract required tribal and Secretarial approval only where some payment was made to the tribe.

We think the court's holding is absurd: The trustee's approval must be given if claims are settled for a sum of money, but no approval is needed if the attorney gives up claim without any payment whatever.

The U.S. Supreme Court refused on February 19, 1980, to hear our appeal. In this way, the Government directly benefitted from its own failure to review our attorney's unauthorized action and, as our trustee, to protect the tribe from loss of its valuable claims.

The present bill, S. 1613, will merely allow the tribe to state again the dismissed claims in the case still pending before the Court of Claims. The claims were properly filed before the 1951 deadline.

No withdrawal was authorized and they should not have been dismissed. The tribe is entitled to have them considered by the court once and for all on their merits.

The Department of Justice has told you that the dismissed claims are still presented in docket Nos. 69, 299, and 353, which asks damages for the Government's failure as our trustee to handle properly our tribal funds and reservation resources. That is incorrect.

The Justice Department took a contrary position in 1979, on a motion to the court for clarification, and the court agreed that none

of the dismissed claims was incorporated in the remaining seventh claim for a general accounting.

I refer to exhibit A, page 9a.

Therefore, we believe the Justice Department will argue in the remaining docket that no claim originally presented in claims 1 through 6 and claim 8 can be asserted as part of claim 7, disavowing its position here.

And it is certain that any claim based on the Government's failure to deal fairly and honorably with the tribe have been dismissed. That wiped out our claim based on the Government's failure to provide education as required by article 6 of the 1868 Treaty, and it prevents our obtaining the same recoveries as other Indian tribes.

The bill will carry out the intent of the Indian Claims Commission Act. The legislative history of that act shows that Congress meant to have tribal claims heard on the merits, and that tribes could recover whenever the facts showed that, in equity and good conscience, recovery was justified.

Congress expected, as the report of the House Committee on Indian Affairs stated—and I refer here to House Report No. 1466, 79th Congress, 1st session, page 13:

> . . . that an impartial determination of the facts will in many, if not in most, cases eliminate the need for further legal proceedings by showing either that there is no basis whatever for recovery on the part of a given tribe or that such recovery, if indicated, does not involve any controverted legal principles.

The comments of the Department of the Interior on the bill, printed in the House report, pointed to the "lack of finality attending dismissal of a case by the Court of Claims on technical legal grounds without consideration of the claim on its merits" and suggested that authority to try "moral claims" as well as strictly legal claims "would overcome the defect in the present system under which many of the claims of the Indians are precluded from a hearing on the merits, on technical legal grounds, even though the claims may be such as would challenge the conscience of a court of equity."

I refer here to page 9 of that House committee report.

The Department repeatedly stressed the Commission's "power to consider the merits of all existing Indian tribe claims"—I refer here to page 16 of the report—and to overcome technical legal barriers to trial.

The Court of Claims' dismissal of the Navajo claims by a technical and unnecessary interpretation of the claim attorney's contract, was thus entirely wrong and contrary to the intent of the act.

We ask prompt passage of S. 1613 to correct that error and prevent adding a new wrong to the deprivations still suffered by our people.

I appreciate the chance to testify.

It has been about 70 years that the United States has ever given us an opportunity to state our position according to the agreement that we have made with the U.S. Government ever since 1868.

Finally, we have an opportunity to present our case, but on the other hand, I believe that the tribe has done everything to keep their promise.

We were surely taken into captivity one day at Fort Summer and the U.S. Government told the Navajo Tribe to behave themselves and stop threatening other races of people.

They told us to lay down our arms and weapons, which we did. To the best of our ability, we kept that. And then the Second World War came along. The U.S. Government came to us and gave us weapons and wanted us to help them win the war.

I believe the Navajo Tribe did everything within their power. We have lost many thousands of our children who have never returned home.

Even our language has been used to win this battle. We feel that we have done a great part in the war. We did everything we could to keep our promise up to this day.

Senator DECONCINI. Mr. Riggs, let me move on, if you do not mind. You are welcome to submit any further statement. Time is running on and I have a Judiciary Committee meeting starting at 10 o'clock and there are a couple of things I would like to get on the record from you or your attorneys.

Maybe Mr. Schaab could help me. Mr. Schaab, you listened to the Justice Department's objections to this. One of the ones that has great interest to me is indicating that these claims, at least claims 1 through 6 and claim 8, are all set forth in docket 229, whatever that is.

What is your response to that?

Mr. SCHAAB. Let me respond to that. We believe that the Justice Department's statement was not correct.

Senator DECONCINI. Would you like to make some specific comments on that as to where you think it is incorrect so that we can verify that for the record? That would be helpful.

Mr. SCHAAB. It was the practice of the Indian Claims Commission, in the first few years of its existence, to encourage tribal attorneys who typically filed petitions setting forth all the tribes claims, as docket 69 did.

The commission then encouraged them to take specific claims that were included in that broad petition and set them up as separate dockets, separate cases, that could be handled separately from the others.

I guess the Commission thought that this would simplify its procedures.

It was under that policy that Norman Watell, the first claims attorney for the Navajo Tribe, prepared separate petitions that were given the Nos. 229, 299, and 353.

Docket 229 was the tribe's claim for the taking of the aberrational lands. That docket, or that case, was settled by agreement between the tribe and the Government in 1980 and finally——

Senator DECONCINI. What claim was that?

Mr. SCHAAB. That is 229. It does not refer to the claims in 69.

Senator DECONCINI. This claim No. 1, which we referred to and read into the record, where the "respondent failed to designate, settle, and adjust petitioner's territorial boundaries, is specifically undertaken in article IX of the aforesaid treaty of 1850," and so forth, and where it specifically indicates the petitioner "thereby lost approximately 20,000 square miles of rich land" and so forth.

The Justice Department said that that claim was settled by the settlement. That is referred to in docket 229, the aboriginal land settlement.

You are saying that is not within that docket; is that correct?

Mr. SCHAAB. I believe that is correct.

Senator DECONCINI. I am on page 18a. So, how do we clarify that?

Mr. SCHAAB. The difference in the claims is that the paragraph that you referred to on page 18a refers to the provisions of the 1850 treaty with the Navajos in which the Government agreed to survey and delineate the Navajo country.

That survey may or may not have been done. The allegation here raises the question of fact. It alleges that the Government failed to survey, as required by the treaty, and had the survey been done, as required by the treaty, then that would have been the recognized title.

The Government coveted, in the 1850 treaty, to recognize this Navajo country as lands of the tribe. Their failure to survey and carry out the treaty was thus stated as grounds for the claims.

I believe that is a claim for recognized title. The tribe had the right to develop with proof and present on its merits, which the Court of Claims has now dismissed on this technical ground.

Senator DECONCINI. Is that your position as to the other claims, claims 1 through 6?

Mr. SCHAAB. Our position is that the claims 1 through 6 and also claim No. 8 were timely filed claims that the tribe had the authority to develop proof on and to present that proof on the merits to the court.

The court has now refused to hear it on these technical grounds.

It remains to be determined by the court precisely which of the issues of the seventh claim that were unaffected by the withdrawal, can still be litigated.

But as Mr. Riggs has pointed out, we anticipate that the Department of Justice will argue as these issues come up that anything that is in the first six claims cannot be adjudicated or litigated in the seventh claim.

Senator DECONCINI. Exactly.

The Department, as you have heard, contends that this bill will allow the Navajo Tribe to assert for the first time claims relating to taking land from the Navajo reservation.

My question, of course, is: Did claims 1 through 6 and 8, docket 69, assert any claims with respect to taking the land from the Navajo reservation?

Mr. SCHAAB. It did in the way I just interpreted the first claim. It was a breech of the 1850 treaty covenant to survey the Navajo country.

Senator DECONCINI. So your position is that the treaty being breeched was the taking?

Mr. SCHAAB. The treaty being breeched was the 1850 treaty and the effect of it was to take recognized title.

Senator DECONCINI. Now what you would like to have considered before the Court of Claims, that is, to at least have an opportunity to present that case; is that right?

Mr. SCHAAB. That is right.

Senator DECONCINI. And have a so-called judicial determination?

Mr. SCHAAB. Yes.

Senator DECONCINI. That is what you have been denied?

Mr. SCHAAB. That is correct.

Senator DeConcini. What efforts have been made to search the tribal files to determine what correspondence, if any, Mr. Mott had with the tribe with respect to the withdrawal of claims 1 through 6 and 8, either prior to his withdrawal of the claim or afterwards?

Mr. Schaab. Let me ask Mr. Barber who personally made a search of the tribal records to describe the search and what the results were.

Mr. Barber. Senator, I personally, about a year ago, I guess, spent several hours in the Navajo Tribes central records and searched all of the tribal council resolutions for the period when Mr. Mott was the claims attorney for the tribe.

I also searched all of the resolutions of the advisory committee of the Navajo Tribal Council, which is sort of an executive committee, to the tribal council.

I found no reference in any of those resolutions where they had approved or disapproved his intended action.

Mr. Riggs, I think, can verify that as a member of the Navajo Tribal Council who was present during that entire time, that he never once learned of this action, either intended or after it happened.

Mr. Riggs. Senator, I have been serving on the council all during that time as well as being on that advisory committee, the executive committee of the Navajo Tribe.

There was not, at any time, that attorney Mott informed the tribe.

Senator DeConcini. Did anyone else inform the tribe?

Mr. Riggs. No.

Senator DeConcini. How did the tribe first find out about it, that is, that it had happened?

Mr. Riggs. It was only until the third claims attorney came on.

Senator DeConcini. He discovered it?

Mr. Riggs. Yes.

Senator DeConcini. What efforts, if any, have been made to either discuss with Mr. Mott or to depose him to determine what his intent was in withdrawing that and what his answers are about notification?

Mr. Schaab. Mr. Chairman, we have received from Mr. Mott the office files that he has, as claims attorney for a 4-year period.

When this question arose initially, we searched those files to see whether or not there were any memoranda or anything that suggested the intent behind the amendment which he filed in 1969. We found nothing.

At that time—and this was in 1974 shortly after I took the claims over in 1973—we did not communicate directly with Mr. Mott to ask him what his intent was, but it was clear that there was no record of what his intent was. We thought it was best, so far as the Commission was concerned, to simply allow the Commission to decide the legal affects of Mr. Mott's amendment.

We were contending that its legal affect was not to dismiss anything. The only thing that he had in mind was to prepare a new petition inasmuch as he was the new claims attorney. The Government had been filing motions asking the Indian Claims Commission to require him to break up this big petition and file separate dockets.

Senator DeConcini. If I understand your position, based on not having talked with Mr. Mott, that he really did not dismiss them with the idea of not having them available to be presented and to be presented in some other manner. But he did that as a process of rep-

resenting the tribe and the Government took that first step that he took as a dismissal and, thereby, threw you out of any possibility of being heard; is that right?

Mr. SCHAAB. The Justice Department put that interpretation on Mr. Mott's action in its representations to the Commission.

Senator DECONCINI. You have not had an opportunity to question Mr. MOTT or talk with him?

Mr. SCHAAB. No, he was not called as a witness on this issue. The Claims Commission did not require it.

Senator DECONCINI. Have you tried to ask him about that?

Mr. SCHAAB. I have not talked with him other than to examine his files. We did not ask him for any personal statement about it. I am not sure that he really recollects it.

He is retired now. He is no longer in active practice.

Senator DECONCINI. I have no further questions. Do you have any other statement?

Mr. SCHAAB. Yes, sir.

Let me state one thing, Senator.

The intent of the bill as it was introduced is to permit the tribe to be able to litigate on the merits the claims that were originally stated in the petition were timely filed in 1950.

We did not seek in any way to broaden the claims beyond those that were stated in the original petition.

I believe the language of the bill is adequate for that purpose and that the Justice Department's statement is incorrect in alleging that the bill will broaden the scope of the claims to permit the tribe now to introduce any new claims.

That is not the intent.

Senator DECONCINI. I thank you.

I think it is clear that what you are looking for is merely an opportunity to present your case. We are not a tryer of facts here. We are a legislative body, and obviously there is a Court of Claims and a procedure to do that.

It seems to me that you ought to have that opportunity at least to be heard. If they decide no, then that is unfortunate for you and your clients that you do not get that chance. I cannot say yes or no because I am not in that position. I think you should be entitled to a hearing.

I want to thank you all very much.

The hearing is adjourned.

[Whereupon, at 9:50 a.m., the hearing was adjourned.]

APPENDIX

Additional Material Received for the Record

WILLIAM A. SLOAN
JACKSON T. AKIN
JOHN D. ROBB
CHARLES B. LARRABEE
JAMES C. RITCHIE
JOHN P. CASTNER
WILLIAM C. SCHAUB
RAY H. RODEY
ROBERT D. TINCHERT
ROBERT H. ST. JOHN
JOSEPH J. BULLING
DUANE C. GILSEY
HADD T. ADAMS
ROBERT G. McCORKLE
PETER B. PRYOR
BRUCE HALL
JOHN P. SALAZAR
WILLIAM E. DIXON
JOHN P. BURTON
REX D. THROCKMORTON
JONATHAN W. HEYES
GENE C. WALTON
RICHARD C. WETZNER
W. ROBERT LASHER, JR.

RICHARD R. BARLOW
CHARLES L. BRUNDERS
HANS C. WEIRING
VICTOR G. MARSHALL
ROBERT A. JOHNSON
PAUL D. BARBER
JOE L. McCLAUGHERTY
JAMES S. STAZYNSKI
CATHERINE T. GOLDBERG
KENNETH J. FERGUSON
STANLEY R. HATCH
DIANE FISHER
W. RICHARD BETTLER, JR.
DONALD B. MONNHEIMER
TIMMIS B. COLLIER
ROBERT D. PARK
BEN M. ALLEN
DANIEL J. HERNANDEZ
JASON A. SEDERQUIST
JO BAXTON BRAYER
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April 15, 1982

Peter Taylor, Esq.
Counsel, Select Committee on
Indian Affairs
6313 Dirksen Building
Washington, D.C. 20510

Navajo Tribe of Indians
S.1613

Dear Mr. Taylor:

After our telephone conversation on April 13, we would like to offer further comments on the Justice Department's Statement on S.1613 presented at the hearings on November 18, 1981, and its later letter to Senator DeConcini dated December 7, 1981. The Justice Department's basic position is that the claims dismissed by the Court of Claims' Opinion of June 13, 1979, and subsequent Order entered September 28, 1979 (Appendices A and B to the printed Petition for Certiorari previously filed with the Committee), are still justiciable under the surviving Seventh Claim, and that "reopening these issues would not only duplicate prior litigation, it would undercut the Government's position." [Statement, p. 3.] The Navajo Tribe seeks enactment of S.1613 to correct a substantive injustice; it does not seek legislation to support its position in pending litigation.

S.1613 should be enacted to correct the Government's failure to protect the Navajo Tribe from the unauthorized action of its second claims attorney, who amended the basic Petition in Docket No. 59 to withdraw Claims 1 through 6 and Claim 8. [Appendix E to Petition for Cert.] The Justice Department's letter dated December 7, 1981, admits that there is "no indication that the Department of Justice informed either the Department of the Interior or the Navajo Tribe that the Tribal Claims attorney intended to, or had dismissed Claims 1 through 6 and 8 in Docket No. 69." The

Department obviously took advantage of the attorney's unauthorized action; its Statement frankly admits that "the United States has relied on the dismissal of Claims 1 through 6 and 8, and has framed its litigation strategy accordingly." Yet in other cases (e.g., Jicarilla Apache Tribe v. U.S., Indian Claims Commission Docket No. 22-A, Exhibit B to Tribal Statement of November 18, 1981), the Government took action to insure that a stipulation by its attorneys giving up a valuable tribal claim was approved by the Commission and the Tribe as required by the attorney's contract. In the Navajo claims case, the Government failed to enforce §6 of the Special Claims Contract [p. 54a, App. D to Petition for Cert.] and thus failed to safeguard the Tribe's interest in achieving a proper disposition of all properly pleaded claims on the merits. That failure also resulted in substantial injury to the Tribe.

The bill mentions three kinds of claims that were dismissed without trial on the merits. The first is wrongful taking of reservation lands. Contrary to the Department of Justice's argument that no such claim was alleged in the dismissed claims, a cursory review of Claim 2 (Navajo land; Treaty of August 13, 1868) indicates such a claim was pleaded. The factual allegations of Claim 2 set forth the circumstances under which Navajo consent to the Treaty of 1868 was obtained, but the prayer (¶16) merely asked that the Treaty be held invalid on grounds of fraud, or that it be revised to include a reservation of the Navajo Tribe's aboriginal homeland. No other relief was requested under Claim 2; however, ¶30 demanded judgment "against the United States of America in an amount to be determined by the fair value of the lands wrongfully taken from petitioner." Thus, a claim for the taking of any tribal land was presented in the Petition, and enactment of S.1613 would not, as the Department of Justice argued, authorize the filing of a new claim.

The second category of claims mentioned by the bill is the Government's failure to deal fairly and honorably with the Navajo Tribe by providing the educational facilities and services promised in Article 6 of the 1868 Treaty. The Department of Justice correctly states that a claim for nonfulfillment of Article 6 is being litigated under Claim

7, but its argument that the Petition did not allege the Government's failure to deal fairly and honorably with the Navajo Tribe is obviously unfounded. In Claim 4 of the Petition, ¶21 expressly alleged that "respondent . . . has departed from standards of fair and honorable dealings, and has violated its duties as guardian for the Petitioner" in failing to carry out the obligations created by Article 6 of the 1868 Treaty. Moreover, ¶30 of the Petition, the general prayer for relief, asks judgment in favor of the Tribe against the United States for "departures from standards of fair and honorable dealings" based upon the factual allegations set forth above. That "fair and honorable dealings" claim was timely filed but is now lost without Congressional action.

Finally, all claims for mismanagement of lands and resources are not "being litigated in Claim Seven" as the Department of Justice argued [Statement, p. 3]. The distinction between the "mismanagement claims" that survive as part of Claim 7 and those that were dismissed by the Court can be understood only in terms of the subsequent litigation. After the Court's Order of September 28, 1979, which rejected the Tribe's argument that all of the issues in Claims 1 through 6 remained as justiciable issues in Claim 7 because the Seventh Claim (¶26) "restates and reaffirms each and every allegation of paragraphs 1 through 9, 11 through 15, 16 and 17, 20, 22, and 24," the Department of Justice argued strongly in a pending appeal involving issues under Claim 7 that any issue in Claim 7 which could have been raised under Claims 1 through 6 or 8 must be treated as having been dismissed. In its Opinion dated May 28, 1980, enclosed herewith, in Docket Nos. 69, 299 and 353 (Accounting Claims), the Court made the following distinctions:

> Before we consider those portions of the trial judge's opinion which we shall review, we deal with a separate contention raised by both sides at the oral argument. After the trial judge's opinion was issued, the court decided that claims 1 through 6 and claim 8 in docket No. 69 should be dismissed as barred by limitations. *Navajo Tribe*, *supra*, 220 Ct. Cl. at ___, 601 F.2d at 539-40. (June 13, 1979, slip op. at 6, 7). In its order denying rehearing of that decision (Sept. 28, 1979), the court ruled that the dismissed claims could not be asserted as part of claim 7 in docket No. 69—the general accounting claim now before us.

At the argument government counsel urged repeatedly that many of plaintiff's exceptions under claim 7 involved the same subject matter or claims as did the dismissed claims and were therefore precluded, under the order of September 28, 1979, from inclusion in general accounting claim 7.

We think that in the breadth of its approach defendant has misconstrued the September 28th order. That order was not meant to delete any true accounting claims already included in claim 7—an all-inclusive claim that asked the Government to account generally and properly for its handling of the Tribe's monies or property over which the Government had exercised control or supervision—simply because the specific item happens to deal with the same general subject matter (*e.g.* land, oil, gas or education) as a dismissed claim. What the September 28th order did, and was meant to do, was to prevent plaintiff from attempting to restate and reinvigorate the dismissed claims, which were *not* accounting claims, in the form (if not the substance) of accounting claims in order to try to bring them now, for the first time, under claim 7. But true accounting claims, involving the disposition of tribal funds and property, have always been warp and woof of claim 7, and they remain so. If the issue is whether the Government, as fiduciary, faithfully managed or used Navajo assets, claim 7 covers the question.

For instance, one of the dismissed claims was that the Government failed to provide educational and other services to the Navajos. The dismissal of that claim does not prevent the plaintiff from urging that defendant must account for the use and disposition of educational monies appropriated by Congress to or for the use of the Navajos specifically; the latter aspect is and has always been fully a part of the general accounting claim we are now considering. On the other hand, the broader contention that the United States failed, apart from the obligations of the 1868 treaty, to appropriate or make available sufficient funds to educate the Navajos to the proper level and in the proper fashion—a contention also apparently contained in the dismissed claim—could not now be restated or included under claim 7.

On this issue of the dismissal of claims 1-6 and 8, the Tribe takes a converse position which we also reject. It says that claim 7 is not merely a true accounting claim, that it likewise covers any "fair and honorable dealings" claim tied to a subject mentioned in the petition—whether or not that "fair and honorable dealings" claim involves federal management of Navajo property or funds. On this basis, plaintiff urges

> that the dismissed claims 1-6 and 8 can all fall squarely within claim 7. This interpretation of claim 7, however, is obviously contrary to our decision of June 1979 in *Navajo Tribe, supra*, and to the rehearing order of September 28, 1979. More than that, the Tribe's argument stretches claim 7 far beyond its proper accounting confines. That claim has always been treated and considered as purely an accounting claim, and we think that it must be restricted to that compass. "Fair and honorable dealing" claims, not involving the Government's management and use of Navajo assets, do not come at all under claim 7.

Under the Court's Opinion, the Tribe can litigate as part of Claim 7 only the Government's "use and disposition of educational monies appropriated by Congress to or for the use of the Navajos specifically." It cannot obtain an adjudication of its claim, clearly pleaded as indicated above, that the United States failed to deal fairly and honorably with the Tribe by failing to provide education in accordance with Article 6 of the 1868 Treaty and later Acts of Congress. The Court further made it clear that any "fair and honorable dealing claims" not related to management of trust assets are not justiciable under Claim 7.

The bill is carefully limited to "claims of the Navajo Indian Tribe against the United States which were timely presented under Section 2 of the Act . . . and later withdrawn without authority." It authorizes no new claims not presented in the original Petition. Thus, there is no danger of any double recovery, and the Government could raise as possible defenses in such reinstated claims the matters it has urged upon the Committee. The bill is needed to prevent the Government's benefitting from its failure to protect the Tribe from the unauthorized acts of its claims attorney. The Tribe should be granted the fair adjudication

on the merits of its claims based on the Government's failure to deal fairly and honorably with respect to tribal education and the management of its resources, which it would have obtained had the government done its duty.

Sincerely yours,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

William C. Schaab

William C. Schaab
Attorney of Record for
The Navajo Tribe of Indians

WCS/cmm

Enclosures

cc: John Mulkey, Legislative Assistant
to Senator Dennis DeConcini
(with enclosure)

The NAVAJO TRIBE OF INDIANS

v.

The UNITED STATES.

Nos. 69, 299 and 353.

United States Court of Claims.

May 28, 1980.

In litigation under the Indian Claims Commission Act with respect to accounting claims of the Navajo tribe, parties sought review of trial judge's rulings. The Court of Claims, Davis, J., held that: (1) trial court properly decided that certain claims should be dismissed as barred by limitations and properly ruled that dismissed claims could not be asserted as part of general accounting claim; (2) trial judge's position on application of fiduciary relationship to accounting claims was proper; (3) trust relationship between Government and Navajo tribe created duty on Government's part to account for its management of tribe's timber, including accounting for proceeds of sales of fire-damaged timber; (4) tribe could properly recover improper treaty expenditures; (5) trial judge acted within his discretion in construing certain subexception as request for accounting; (6) remand was required for consideration of claim with respect to Government's obligation to make tribal funds productive either by depositing them in interest-bearing account or by investing them fruitfully; (7) Government's obligation under 1868 Treaty to provide education for Navajos lasted for no more than ten years; and (8) other issues required reconsideration.

Remanded.

1. United States ⇐105

In Indian accounting cases, once plaintiff has filed exceptions to accounting, trial judge should not mechanically allow defendant to file motions to dismiss or to strike, or for more specific statement; rather, trial judge should decide in each instance, perhaps after pretrial conference, which issues raised by exception should be sent directly to trial, as to which issues the parties should be directed or permitted to file motions for summary judgment, which issues should be clarified by further filings or submissions by plaintiff of defendant and, if motion to dismiss or for summary judgment is allowed to be filed, whether trial judge or court should initially decide that dispositive motion. Indian Claims Commission Act, § 1 et seq., 25 U.S.C.A. § 70 et seq.

2. United States ⇐105

Objective in Indian accounting claims litigation should always be to conclude litigation as speedily and simply as feasible, without needless or burdensome steps or complications. Indian Claims Commission Act, § 1 et seq., 25 U.S.C.A. § 70 et seq.

3. United States ⇐105

There must be an end to the filing of exceptions to existing accounting reports in Indian accounting cases; thus, supplemental exceptions filed before judge must be the last. Indian Claims Commission Act, § 1 et seq., 25 U.S.C.A. § 70 et seq.

4. United States ⇐105

In litigation under Indian Claims Commission Act relating to accounting claims of Navajo tribe, trial judge properly dismissed certain claims and ruled that they could not be asserted as part of another general accounting claim. Indian Claims Commission Act, § 1 et seq., 25 U.S.C.A. § 70 et seq.

5. Fraud ⇐50

Existence vel non of a fiduciary relationship can be inferred from nature of transaction or activity.

6. Indians ⇐6

Where federal Government takes on or has control or supervision over Indian tribal monies or properties, fiduciary relationship normally exists with respect to such monies or properties unless Congress has provided otherwise, even though nothing is said expressly in authorizing or underlying statute or other fundamental document about trust fund or trust or fiduciary connection.

7. United States ⇐105

Application of fiduciary relationship was proper with respect to accounting claims of Navajo tribe under Indian Claims Commission Act. Indian Claims Commission Act, § 1 et seq., 25 U.S.C.A. § 70 et seq.

8. Indians ⇐6

Trust relationship between Government and Navajo tribe created duty, on Government's part, to account for its management of tribe's timber, including an accounting for proceeds of sales of fire-damaged timber. Act Mar. 4, 1913, 37 Stat. 1015; Treaty with the Navajo Indians, arts. 1 et seq., 2, 15 Stat. 667.

9. Indians ⇐3

Contract such as Indian treaties should be scrutinized to determine whether fiduciary duties of Government were met.

10. Indians ⇐3

In the use of Indian treaty funds, Government is subject to fiduciary accounting principles, regardless of whether shortages in treaty funds may also be termed contractual breaches.

11. Indians ⇐3

Where Government, acting as fiduciary, has improperly charged expenses to Indians when they actually benefited Government or other third parties, or has failed to expend funds appropriated for benefit of Indians in manner provided for by treaty, such amounts are properly excepted to and may be recovered by an Indian tribe; however, tribe can recover only for improper treaty expenditures to extent that they exceed any offsets to which Government is entitled. Indian Claims Commission Act, § 2, 25 U.S.C.A. § 70a.

12. Indians ⇐6

Once Congress has appropriated money specifically for Indian tribe's benefit, tribe has legitimate right to know whether any of those appropriations were applied to non-tribe beneficiaries in contravention of appropriation acts.

13. Indians ⇐6

To recover interest or damages for non-investment of Indian trust funds, Indians must show statutory, treaty, or contract authority calling for payment of interest or for investment of tribal funds.

14. United States ⇐105

In litigation under Indian Claims Commission Act with respect to accounting claims of Navajo tribe, remand was required for consideration of extent of Government's obligation to make tribal funds productive either by depositing them in interest-bearing accounts or by investing them fruitfully. Indian Claims Commission Act, § 1 et seq., 25 U.S.C.A. § 70 et seq.

15. Indians ⇐3

Government's obligation under 1868 treaty with Navajo tribe to provide education for Navajos lasted no more than ten years. Act May 25, 1918, § 28, 40 Stat. 561; Act June 24, 1938, 52 Stat. 1037.

William C. Schaab, Albuquerque, N.M., attorney of record, for plaintiff. Paul D. Barber, Albuquerque, N.M. and Sarah W. Barlow, Albuquerque, N.M., of counsel.

Dean K. Dunsmore, Washington, D. C., with whom was Asst. Atty. Gen. James W. Moorman, Washington, D. C., for defendant. Marvin E. Schneck, A. Donald Mileur, George R. Hyde and Glen R. Goodsell, Washington, D. C., of counsel.

Charles A. Hobbs, Washington, D. C., for The Three Affiliated Tribes of The Fort Berthold Reservation, Angelo A. Iadarola, Washington, D. C., for the Nez Perce Tribe of the Nez Perce Reservation, Jerry C. Straus, Washington, D. C., for the Blackfeet and Fort Belknap Reservations, and Frances L. Horn, Washington, D. C., for the Shoshone-Bannock Tribes of the Fort Hall Reservation, amici curiae. Wilkinson, Cragun & Barker, Patricia L. Brown and Robin A. Friedman, Washington, D. C., of counsel.

Before FRIEDMAN, Chief Judge, and DAVIS and SMITH, Judges.

ON REQUESTS FOR REVIEW OF TRIAL JUDGE'S OPINION

DAVIS, Judge:

Perhaps the most complex and troublesome of the remaining litigations under the Indian Claims Commission Act are the accounting claims of the Navajo Tribe (Nos. 69, 299 and 353). Since the transfer of those cases to us from the Commission in December 1976, the court has already passed five times upon separate aspects of one or another of the claims.[1] The present appeal concerns another very large chunk of those accounting problems.

The matrix of the case, as it comes to us, consists of a series of six accounting reports filed by the Government in 1953, 1958, 1959, and 1961 with respect to these accounting claims—mainly in docket No. 69. With the permission of the Commission, the Tribe filed, successively, numerous exceptions to these reports. The exceptions now before us are the supplementary exceptions. The Government then filed a motion to dismiss most of these supplementary exceptions (or to strike or for a more definite statement), giving its reasons in 145 separate parts of its motion.[2] Trial Judge Bernhardt has laboriously and carefully considered all aspects of this motion in an opinion (filed September 19, 1978) of some 188 pages which is now before us on requests for review by both sides.[3]

I

Our first task is to clear the field—to separate out the items which we should review at this time from those interlocutory rulings which are not appropriate for present appellate consideration but should be left for review (to the extent the issues survive) at the final conclusion of the Trial Division's determination. In *Navajo Tribe, supra*, 220 Ct.Cl. at ——, 597 F.2d at 1365–66 (1979), the court decided that it would automatically review, as of right, decisions of the Trial Division on dispositive motions in transferred Indian cases. The corollary of that ruling is that interlocutory, procedural rulings of the trial judges are not to be reviewed as of right unless certified by the trial judge under Rule 53(c)(2)(i). In the absence of certification, such procedural rulings will not be reviewed on an interlocutory basis unless the strict conditions of Rule 53(c)(2)(ii) are satisfied.[4] Those are the provisions for interlocutory review which govern all non-appeal cases being handled in this court by a trial judge. No exception exists for Indian cases or, more specifically, for Indian accounting cases.[5]

1. *Navajo Tribe v. United States*, 218 Ct.Cl. ——, 586 F.2d 192 (Oct.1978), *cert. denied*, 441 U.S. 944, 99 S.Ct. 2163, 60 L.Ed.2d 1046 (1979); *Navajo Tribe v. United States*, 220 Ct.Cl. ——, 597 F.2d 1362 (April 1979); *Navajo Tribe v. United States*, 220 Ct.Cl. ——, 597 F.2d 1367 (April 1979); *Navajo Tribe v. United States*, 220 Ct.Cl. ——, 601 F.2d 536 (June 1979), *cert. denied*, Feb. 19, 1980; *Navajo Tribe v. United States*, 222 Ct.Cl. ——, 610 F.2d 766 (Dec.1979).

2. The trial judge tells us that the exceptions and motion briefs before him aggregated 739 pages.

3. The trial judge's opinion of September 19, 1978 (now on review) does not cover a number of additional accounting reports filed by the Government in June 1975 and later.

4. These standards are as follows: "[U]pon a showing of extraordinary circumstances whereby further proceedings pursuant to the said order [or ruling] would irreparably injure the complaining party or occasion a manifest waste of the resources of the court or of the parties. In general, the policy of the court is that proceedings before trial judges will not be interrupted by appeals to the court for piecemeal determinations, and the court will deal with the entire case or a properly severed aspect thereof, on a single occasion only. The mere fact that deferring correction of the trial judge's alleged error to the court's review of the trial judge's final decision may lead to a remand for a new trial, or for the taking of further evidence, or for reconsideration by the trial judge, or may cause delay in the ultimate disposition of the case, will not be deemed, by itself, to satisfy the standards of subdivision (ii)."

5. The rule that dispositive motions or decisions come automatically to the court does not encompass any sub-rule that interlocutory matters (on *other* subjects or claims) which happen to be included in the same opinion become reviewable as of right simply because they are made in the same opinion as a dispositive ruling on a separate subject or claim.

In our view, most of the trial judge's rulings now brought before us fall into the category of interlocutory procedural decisions which do not merit prompt or immediate review under Rule 53(c)(2)(ii).[6] On the Government's appeal, many of the challenged rulings deal with such routine procedural, non-dispositive matters as (a) the need for a more definite statement of a plaintiff's exception, (b) the necessity to cite specific statutes as the basis for an exception, (c) citation of irrelevant or incorrect statutes in an exception, (d) whether later filings or submissions by the defendant, or actions of the trial judge or the court, have mooted or answered an exception by the plaintiff, (e) whether plaintiff or defendant has better access to certain information or records, (f) whether the Government should hand over or make available to the Tribe certain records, documents, or materials, (g) how far the Government must go in explaining to plaintiff its handling of tribal funds or property, (h) deferral of decision by the trial judge until further clarification by the parties or until a later stage in the proceedings,[7] (i) whether certain issues are more appropriately considered in later or separate proceedings, (j) denial by the trial judge of parts of the defendant's motion to dismiss an exception without prejudice to the Government's later renewal of the same issue, (k) claims by the Government that plaintiffs have split a single cause of action, (*l*) consolidation of various claims, and (m) rulings on plaintiff's motion to renew interrogatories. In addition, the defendant complains of several statements in the trial judge's opinion which are obviously dicta or preliminary observations rather than firm holdings. We include in the same class of interlocutory rulings holdings that the facts are not clear or developed enough to permit a proper disposition of the exception at this time.

For its part, plaintiff raises such comparable procedural, non-dispositive issues as (a) whether the citation in an exception of certain legislation is exclusive or illustrative; (b) the amount and detail of government information to which the Tribe is entitled; (c) the amount of specification which may be required of plaintiff at the exception stage of the accounting proceeding; (d) deferral of rulings by the trial judge until a later stage of the proceedings; and (e) rulings (or failures to rule) on burden of proof and the burden of going forward with the evidence. Like the Government, the Tribe also challenges some plain dicta in the trial judge's opinion.

We see no adequate reason why we should pass at this time on procedural or non-dispositive rulings of this type. They are truly interlocutory, subject to the trial judge's discretion, and may "wash out" in the course of the further proceedings. Nor do they meet our normal standards for immediate, interlocutory review (as described above). If we were to review, as of right, such rulings or statements in Indian accounting cases, we would be undertaking an enormous, perhaps impossible, burden—as this case demonstrates conclusively—without concomitant benefit to the proceedings or the litigation. We would also be prolonging these Indian accountings by all the months needed for the submission, argument, and decision of numerous interlocutory appeals.

Accordingly, we decline now to consider or rule upon all parts of Trial Judge Bernhardt's decision except those portions specifically mentioned and considered in the ensuing discussion (Parts III–X of this opinion). The group of rulings which we shall not consider includes, as well, the segments of the trial judge's opinion to which neither party has excepted, and in addition certain

6. The trial judge has certified none of the rulings for review, possibly because he considered that they would be reviewed as of right by the court.

7. For instance, the trial judge deferred decision on issues which he thought would be controlled by decisions of the court in cases not yet argued or decided by us at the time he rendered his decision—particularly the *Navajo Tribe* case, *supra*, 218 Ct.Cl. —, 586 F.2d 192, involving the coverage of the Indian Claims Commission Act of "continuing wrongs" occurring after August 1946.

procedural questions with dispositive facets or overtones which we deem unworthy of separate consideration at this stage.

In declining to consider these parts of the trial judge's opinion, we do not adopt or refuse to adopt them. More than that, we neither approve nor reject them, nor intimate any view as to their contents or merits. The trial judge is free to reconsider them or to change them as he deems appropriate in view of later decisions, later occurrences in the litigation, or changes in his position.

II

[1] Profiting from the unfortunate experience on these Navajo accounting claims, we direct that in the future the Trial Division, once a plaintiff has filed exceptions to an accounting, should not mechanically allow the defendant to file motions to dismiss or to strike, or for a more definite statement, etc. Instead, in Indian accounting cases the trial judge should decide in each instance—perhaps after a pretrial conference—(a) which issues raised by exception should be sent directly to trial, (b) as to which issues the parties (or one party) should be directed or permitted to file motions for summary judgment (or motions to dismiss) which can be decided separately from the trial,[8] (c) which issues should be clarified by further filings or submissions by plaintiff or defendant (including the filing of an answer to the exception) before those issues are set for trial or scheduled for disposition by dispositive motion, and (d) if a motion to dismiss or for summary judgment is allowed to be filed, whether the trial judge or the court should initially decide that dispositive motion.

[2] The objective should always be to conclude the litigation as speedily and simply as feasible, without needless or burdensome steps or complications. *See* Part IV of *Navajo Tribe, supra*, 220 Ct.Cl. at —, —, 601 F.2d at 540 (1979); *Temoak Band of Western Shoshone Indians v. United States*, 219 Ct.Cl. —, —, 593 F.2d 994, 998–99 (1979), *cert. denied*, — U.S. —, 100 S.Ct. 469, 62 L.Ed.2d 389 (1979). As Chief Judge Friedman said in *Navajo Tribe, supra*: "There is a need for innovative handling and treatment, perhaps to devise new procedures that will end the delays that have plagued these cases for so many years. We have faith in the ability of the trial judges to develop such techniques." 220 Ct.Cl. at —, 601 F.2d at 540.

[3] There is a cognate problem to which we must also refer. In these Navajo cases, the trial judge commented unfavorably on the continuous flow of exceptions and supplemental exceptions from the plaintiff, and ruled that the supplemental exceptions then before him "must be the last." We confirm and emphasize that holding.[9] There must be an end to the filing of exceptions to the existing accounting reports in these Navajo cases, and in other Indian accounting cases there should not be allowed the successive filings of exceptions to the same reports which have been permitted in the present cases.[10]

III

Before we consider those portions of the trial judge's opinion which we shall review,

8. It is open to the trial judge to decide, in his discretion, that even though an issue is technically or substantively eligible for disposition by summary judgment or motion to dismiss, it should nevertheless be included in the issues to be tried in the accounting trial.

9. The Commission allowed the plaintiff to file the supplementary exceptions which are the foundation of the trial judge's opinion now before us. Though the defendant renews its objection to the allowance of that filing, we consider it too late in the day, and inappropriate at this time, to go back on, or reverse, the Commission's order permitting the filing.

10. As Trial Judge Bernhardt pointed out: "It has been 17 years since the filing of the 1961 [Accounting] Report at which the present supplemental exceptions are aimed. The grist of the supplemental exceptions could have been filed at the time the original exceptions were filed in 1970, and for the most part (so far as we can determine from a cursory comparison) relate to new matters not raised before. Advent of new counsel may explain, but does not extenuate, endless second thoughts as to deficiencies of the 1961 Report."

we deal with a separate contention raised by both sides at the oral argument. After the trial judge's opinion was issued, the court decided that claims 1 through 6 and claim 8 in docket No. 69 should be dismissed as barred by limitations. *Navajo Tribe, supra*, 220 Ct.Cl. at ——, 601 F.2d at 539–40. In its order denying rehearing of that decision (Sept. 28, 1979), the court ruled that the dismissed claims could not be asserted as part of claim 7 in docket No. 69—the general accounting claim now before us.

At the argument government counsel urged repeatedly that many of plaintiff's exceptions under claim 7 involved the same subject matter or claims as did the dismissed claims and were therefore precluded, under the order of September 28, 1979, from inclusion in general accounting claim 7.

We think that in the breadth of its approach defendant has misconstrued the September 28th order. That order was not meant to delete any true accounting claims already included in claim 7—an all-inclusive claim that asked the Government to account generally and properly for its handling of the Tribe's monies or property over which the Government had exercised control or supervision—simply because the specific item happens to deal with the same general subject matter (e. g. land, oil, gas or education) as a dismissed claim. What the September 28th order did, and was meant to do, was to prevent plaintiff from attempting to restate and reinvigorate the dismissed claims, which were *not* accounting claims, in the form (if not the substance) of accounting claims in order to try to bring them now, for the first time, under claim 7. But true accounting claims, involving the disposition of tribal funds and property, have always been warp and woof of claim 7, and they remain so. If the issue is whether the Government, as fiduciary, faithfully managed or used Navajo assets, claim 7 covers the question.

For instance, one of the dismissed claims was that the Government failed to provide educational and other services to the Navajos. The dismissal of that claim does not prevent the plaintiff from urging that defendant must account for the use and disposition of educational monies appropriated by Congress to or for the use of the Navajos specifically; the latter aspect is and has always been fully a part of the general accounting claim we are now considering. On the other hand, the broader contention that the United States failed, apart from the obligations of the 1868 treaty, to appropriate or make available sufficient funds to educate the Navajos to the proper level and in the proper fashion—a contention also apparently contained in the dismissed claim—could not now be restated or included under claim 7.

[4] On this issue of the dismissal of claims 1–6 and 8, the Tribe takes a converse position which we also reject. It says that claim 7 is not merely a true accounting claim, that it likewise covers any "fair and honorable dealings" claim tied to a subject mentioned in the petition—whether or not that "fair and honorable dealings" claim involves federal management of Navajo property or funds. On this basis, plaintiff urges that the dismissed claims 1–6 and 8 can all fall squarely within claim 7. This interpretation of claim 7, however, is obviously contrary to our decision of June 1979 in *Navajo Tribe, supra*, and to the rehearing order of September 28, 1979. More than that, the Tribe's argument stretches claim 7 far beyond its proper accounting confines. That claim has always been treated and considered as purely an accounting claim, and we think that it must be restricted to that compass. "Fair and honorable dealing" claims, not involving the Government's management and use of Navajo assets, do not come at all under claim 7.

IV

[5] On the Government's request for review, we take up first defendant's challenge to the trial judge's general discussion (in Part I of his opinion) of the fiduciary relationship between the United States and the

Indians.[11] Defendant contends that no fiduciary obligation can arise unless there is an *express* provision of a treaty, agreement, executive order or statute creating such a trust relationship, and the trust relationship is limited by the precise terms of the document. If by this the Government means that the document has to say in specific terms that a trust or fiduciary relationship exists or is created, we cannot agree. The existence *vel non* of the relationship can be inferred from the nature of the transaction or activity.

[6] In particular, where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection. *See Seminole Nation v. United States*, 316 U.S. 286, 296–300, 62 S.Ct. 1049, 1054, 1056, 86 L.Ed. 1480 (1942); *Menominee Tribe of Indians v. United States*, 101 Ct.Cl. 10, 18–20 (1944); *Menominee Tribe of Indians v. United States*, 102 Ct.Cl. 555, 562 (1945); *Navajo Tribe v. United States*, 176 Ct.Cl. 502, 507, 364 F.2d 320, 322 (1966); *Cheyenne-Arapaho Tribes v. United States*, 206 Ct.Cl. 340, 345, 512 F.2d 1390, 1392 (1975); *Coast Indian Community v. United States*, 213 Ct.Cl. 129, 152–54, 550 F.2d 639, 652–53 (1977). In *Menominee Tribe, supra*, we held explicitly that a special jurisdictional statute making ordinary fiduciary standards applicable to the United States, "add[s] little to the settled doctrine that the United States, *as regards its dealings with the property of the Indians*, is a trustee." (emphasis added). 101 Ct.Cl. at 19. Likewise, *Navajo Tribe, supra*, 176 Ct.Cl. at 507, 364 F.2d at 322, observed that "[n]umerous cases have expressed the notion that, *when dealing with Indian property*, the Government may be acting as a 'trustee.'" (emphasis added).

The same principle—that for Indian tribal property there need not be express designation of special status—is reflected in other opinions. In *Cramer v. United States*, 261 U.S. 219, 43 S.Ct. 342, 67 L.Ed. 622 (1923), the Supreme Court voided a federal land patent which had granted Indian-occupied lands to a railway. Relying heavily on the trust relationship with the Indians, and the national policy protecting Indian land occupancy, the Court found that the general statutory authority of federal officials to issue land patents was limited, even though Indian occupancy of the lands was not expressly protected by treaty, executive order, or statute. *Id.* at 227–29, 43 S.Ct. at 344. The Court stated that "[t]he fact that such [Indian] right of occupancy finds no recognition in any statute or other formal Governmental action is not conclusive." *Id.* at 229, 43 S.Ct. at 344. *See also, Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113, 39 S.Ct. 185, 186, 63 L.Ed. 504 (1919) (even in the absence of a treaty or statute protecting Indian lands from sale by the Government, the court could enjoin the Government from treating Indian lands as public lands and disposing of them under public land laws); *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F.Supp. 1238, 1245–46 (N.D.Cal.1973) (the duty to make trust property income productive arises from the trust relationship between an Indian tribe and the United States; it exists even in the absence of a specific statute). *Cf. Pyramid Lake Paiute Tribe of Indians v. United States*, 354 F.Supp. 252, 257 (D.D.C. 1973), *rev'd on other grds.*, 499 F.2d 1095 (D.C.Cir.1974) (although no treaty or statute was violated by the Government's actions relating to the diversion of water from an Indian reservation to a federal dam and reclamation project, the Government was enjoined from proceeding with the diversion because the diversion would be in violation of the Government's trust responsibility to the tribe).

11. Though this issue does not arise in the context of a dispositive ruling (in Part I of the trial judge's opinion) we consider it now because we view it as a seminal question for all of the further proceedings in this accounting and in other Claims Commission Act accountings.

On the other hand, if no tribal money or property is involved and the question is, for instance, whether the United States has a general fiduciary obligation to educate Indians, the existence of the special relationship for that purpose depends upon the proper interpretation of the terms of some authorizing document (*e. g.* statute, treaty, executive order). *Gila River Pima-Maricopa Indian Community v. United States*, 190 Ct.Cl. 790, 797–98, 427 F.2d 1194, 1198, *cert. denied*, 400 U.S. 819, 91 S.Ct. 37, 27 L.Ed.2d 47 (1970).

[7] The present accounting claims all deal with the management and disposition of Navajo funds and property. Defendant's insistence on express or statutory terms of trust is therefore irrelevant to these claims. Nor is the court required to find all the fiduciary obligations it may enforce within the express terms of an authorizing statute (or other document). The general law of fiduciary relationships can be utilized to the extent appropriate. *Cf.* cases cited above and *Duncan v. United States*, 220 Ct.Cl. ——, 597 F.2d 1337, 1346 (1979), remanded by Sup.Ct. for reconsideration, April 21, 1980, and *see* Part V of this opinion *infra*. This does not mean, however, that all the rules governing the relationship between private fiduciaries and their beneficiaries and accountings between them necessarily apply in full vigor in an accounting claim by an Indian tribe against the United States. We refer to such rules as the principle that once a breach of fiduciary duty is merely charged (without any supporting material), the beneficiary is entitled to recover unless the fiduciary affirmatively establishes that it properly discharged its trust, and the theory that failure to render the precise form of accounting required may be sufficient, in and of itself, to establish liability. In each situation, the precise scope of the fiduciary obligation of the United States and any liability for breach of that obligation must be determined in light of the relationships between the Government and the particular tribe.

Accordingly, we reject defendant's appeal on this point, and affirm, in general, the trial judge's position on the application of the fiduciary relationship to these accounting claims.

V

Our holding in Part IV, *supra*, of this opinion leads us directly to affirmation of the trial judge's ruling rejecting defendant's motion to dismiss plaintiff's supplemental exception li (Part XIX of the trial judge's opinion). That exception states that the accounting report prepared in 1961 on the Navajo Tribe fails to account for sales of fire-damaged timber on tribal lands pursuant to the Act of March 4, 1913, ch. 165, 37 Stat. 1015, 1016. The act authorized the Secretary of the Interior to sell fire-damaged timber located on public and ceded Indian lands.

In accord with its general stance (*see* Part IV, *supra*), defendant takes the position that plaintiff is only entitled to an accounting based on a specific statute, treaty, agreement, etc. and that the particular statute relied on by plaintiff in requesting an accounting of sales of fire-damaged timber is inapplicable to these Navajo lands.[12] We need not reach the difficult question of whether the statute cited by plaintiff applies to plaintiff's lands,[13] since, as already indicated, we agree with plaintiff that defendant must account for its handling of plaintiff's timber, even in the absence of a specific statute requiring its sale or fruitful disposition.

The treaty of June 1, 1868, 15 Stat. 667, between the Navajo Tribe and the United States, while it did not specifically speak to plaintiff's timber rights or defendant's responsibilities for them, did create a reservation for plaintiff, in Article II. From the creation of this reservation, certain rights and responsibilities emerged One of the

12. Defendant's argument is based on its interpretation of "ceded Indian lands," which defendant contends was not intended to cover plaintiff's lands. *See* 48 Cong.Rec. 9847 (1912).

13. The trial judge rejected defendant's interpretation of "ceded Indian lands," and found that plaintiff's reservation lands were covered by the 1913 Act.

rights which plaintiff obtained was the right to timber on its tribal reservation lands. *See Oneida Tribe of Indians of Wisconsin v. United States*, 165 Ct.Cl. 487, 490–91 *cert. denied*, 379 U.S. 946, 85 S.Ct. 441, 13 L.Ed.2d 544 (1964); *United States v. Shoshone Tribe*, 304 U.S. 111, 116–18, 58 S.Ct. 794, 797, 798, 82 L.Ed. 1213 (1938). Those timber rights are a proper subject for a claim under the Indian Claims Commission Act. *Oneida Tribe, supra*, 165 Ct.Cl. at 490–92.

As we have said, the Government may not avoid its responsibility toward plaintiff's timber by arguing that the 1868 treaty did not expressly create a fiduciary relationship between plaintiff and the United States. *Oneida Tribe, supra*, 165 Ct.Cl. at 492–94. The relationship between defendant and the Indian tribes is a special one, see the discussion in Part IV, *supra*, and from it special responsibilities stem where the Government has control and supervision over tribal property. *Oneida Tribe, supra*, 165 Ct.Cl. at 493; *Seminole Nation, supra*, 316 U.S. at 296–97, 62 S.Ct. at 1049–1054, 86 L.Ed. 1480; *Navajo Tribe, supra*, 176 Ct.Cl. at 507, 364 F.2d at 322. This special trust relationship and the responsibilities it creates have been expressly held to extend to tribal timber. *Oneida Tribe, supra*, 165 Ct.Cl. at 493; *Blackfeet & Gros Ventre Tribes v. United States*, 32 Ind.Cl.Comm. 65, 77, 81 (1973), *reh'g denied*, 34 Ind.Cl. Comm. 122 (1974).[14] Moreover, this special or fiduciary relationship has been specifically found to exist between the Government and plaintiff Navajo Tribe with respect to tribal property. *See Navajo Tribe, supra*, 176 Ct.Cl. at 507, 364 F.2d at 322.

Where a trust relationship between the Government and the Indians is established, the Government's actions "must [normally] be judged according to the standard applicable to a trustee engaged in the management of trust property." *Coast Indian Community, supra*, 213 Ct.Cl. at 153, 550 F.2d at 652. A "trustee is under a duty to the beneficiary to keep and render clear and accurate accounts with respect to the administration of the trust." Restatement (Second) of Trusts § 172 (1959). *See also, Sioux Tribe of Indians v. United States*, 105 Ct.Cl. 725, 802, 64 F.Supp. 312, 331, *cert. denied*, 337 U.S. 908, 69 S.Ct. 1045, 93 L.Ed. 1720 (1949); *Blackfeet & Gros Ventre Tribes, supra*, 32 Ind.Cl.Comm. at 85. In *Blackfeet*, the Indian Claims Commission specifically found a duty on the Government's part, to account for its efforts to salvage timber damaged by a catastrophic fire. *Id.* at 81.

[8] We find therefore that the trust relationship between the Government and the Navajos creates a duty, on the Government's part, to account for its management of plaintiff's timber, including an accounting for proceeds of sales of fire-damaged timber. This duty exists independently of a statute requiring the sale or disposition of such timber. Accordingly, we affirm on this ground the trial judge's ruling denying defendant's motion to dismiss plaintiff's supplemental exception li.

VI

Next, we consider defendant's request that we review and reverse the trial judge's ruling denying dismissal of plaintiff's supplemental exception 9 (Part CX of the trial judge's opinion). That exception seeks disallowance of certain disbursements of funds under the June 1, 1868 treaty between the Navajo Tribe and the United States, 15 Stat. 667. Supplemental exception 9 contains ten sections, each of which disputes specific expenditures listed in a report prepared by the General Accounting Office.[15] The challenged disbursements include those

14. The defendant's trust obligations toward tribal timber, have been found to be particularly strict, to be established by law, and to require no proof of their existence. *Blackfeet & Gros Ventre Tribes, supra*, 32 Ind.Cl.Comm. at 77, 81.

15. Defendant also seeks review of the trial judge's rulings with respect to certain of these subsections of supplementary exception 9. Except insofar as our discussion in this Part VI or the next Part VII of our opinion may deal with those requests for review, we leave the trial judge's opinion unscrutinized at this time.

which the Tribe alleges were not made for purposes stipulated in the treaty, were for inferior or unsuitable goods or were not for the benefit of the Navajos. We affirm the trial judge's denial (in Part CX of his opinion) of defendant's motion to dismiss supplementary exception 9.

The disbursements which plaintiff seeks to disallow in this exception were made by the Government in an attempt to fulfill partially its obligations under the 1868 treaty. "In carrying out its treaty obligations with the Indian Tribes, the Government * * * [is] judged by the most exacting fiduciary standards." *Seminole Nation, supra*, 316 U.S. at 296–97, 62 S.Ct. at 1049, 1054, 86 L.Ed. 1480; *United States v. Mason*, 412 U.S. 391, 398, 93 S.Ct. 2202, 2207, 37 L.Ed.2d 22 (1973); *Navajo Tribe, supra*, 176 Ct.Cl. at 507, 364 F.2d at 322. This fiduciary relationship creates a duty on the part of the United States, as trustee, to account for its performance of treaty obligations. *Sioux Tribe of Indians, supra*, 105 Ct.Cl. at 802, 64 F.Supp. at 331. *Ottawa-Chippewa Tribe v. United States*, 35 Ind.Cl.Comm. 385, 405 (1975); *Blackfeet & Gros Ventre Tribes, supra*, 32 Ind.Cl.Comm. at 85.

Defendant contends nevertheless that plaintiff is entitled only to recover shortages in the 1868 treaty obligations in a breach of contract action, and cannot have an accounting, or recover in an accounting for, those expenditures from the treaty fund which are shown to be improper, so long as total treaty obligations are met. This argument is based on a number of cases in which this court and the Indian Claims Commission stated that the Government's failure to meet treaty provisions is a breach of contractual obligations rather than a breach of trust. *United States v. Mescalero Apache Tribe*, 207 Ct.Cl. 369, 408–09, 518 F.2d 1309, 1333 (1975), *cert. denied*, 425 U.S. 911, 96 S.Ct. 1506, 47 L.Ed.2d 761 (1976); *Confederated Salish & Kootenia Tribes v. United States*, 175 Ct.Cl. 451, 454–55, *cert. denied*, 385 U.S. 921, 87 S.Ct. 228, 17 L.Ed.2d 145 (1966); *Te-Moak Bands v. United States*, 31 Ind.Cl.Comm. 427, 540–42 (1973). This language occurred, however, in the context of rejection of claims for interest, which was available only on money in trust funds, as opposed to money set aside to fulfill treaty obligations. *See, e. g. Te-Moak, supra*, 31 Ind.Cl.Comm. at 540–42.

[9] In *Ottawa-Chippewa, supra*, the Commission was faced with an argument very similar to that made by defendant in this case. There, the Government argued that it had no duty to account for certain questioned treaty expenditures since plaintiff's claim was for breach of contract rather than equitable accounting. 35 Ind.Cl.Comm. at 404. Defendant relied on *Te-Moak* as its authority. The Commission refused to interpret the language in *Te-Moak*, regarding the treatment of shortages in treaty payments as breaches of contractual obligations, to mean that the United States did not have a duty "to make a fiduciary's accounting for its performance of treaty obligations * * *." *Id.* at 405. In rejecting defendant's argument, the Commission relied on the language in *Seminole Nation*, stating that when it is "carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party." 316 U.S. at 296, 62 S.Ct. at 1054. Rather, the Government's conduct must be judged by high fiduciary standards. *Id.* at 297, 62 S.Ct. at 1054. Contracts such as treaties should be scrutinized to determine whether these fiduciary standards were met. *Ottawa-Chippewa, supra*, 35 Ind.Cl.Comm. at 405. The Commission found that the claim in *Ottawa-Chippewa* for recovery of amounts improperly expended under the applicable treaty was a demand for an accounting, and that no other remedy would be responsive to the claim. *Id.* at 406. We agree with the Commission's analysis in *Ottawa-Chippewa*, and apply it to this case.

[10] Here, as in *Ottawa-Chippewa*, the Tribe has disputed certain disbursements of Navajo funds on the grounds that they were improperly expended, and were not used for the benefit of the Navajos. The

exceptions are related to trust accounting, not only to breach of contract, and we agree with the Commission that a remedy involving a fiduciary accounting is responsive to such claims. In its use of treaty funds, the Government is subject to fiduciary accounting principles, regardless of whether shortages in treaty funds may also be termed contractual breaches.

[11] Where the Government, acting as a fiduciary, has improperly charged expenses to the Indians when they actually benefited the Government or other third parties, or has failed to expend funds appropriated for the benefit of the Indians in the manner provided for by treaty, these amounts are properly excepted to, and may be recovered by an Indian tribe. *See, e. g., Rogue River Tribe of Indians v. United States*, 105 Ct.Cl. 495, 550, 552, 64 F.Supp. 339, 343–44 (1946); *Seminole Nation v. United States*, 102 Ct.Cl. 565, 629–31, *cert. denied*, 326 U.S. 719, 66 S.Ct. 24, 90 L.Ed. 426 (1945). However, plaintiff can recover only for improper treaty expenditures to the extent that they exceed any offsets to which defendant is entitled. *See, Rogue River, supra*, 105 Ct.Cl. at 552, 64 F.Supp. at 343–44. *See also*, 25 U.S.C. § 70a. Defendant will therefore have the opportunity to prove that it made sufficient proper expenditures to cancel out any improper charges, and thus that its treaty obligations were fulfilled even though certain expenditures are disallowed. This provision for offsets will prevent the kind of double recovery defendant predicts will occur if supplementary exception 9 is not dismissed.

Defendant's main concern seems to arise from its apprehension that the Indians will somehow receive a double recovery for the challenged disbursements, since various non-accounting claims in other dockets of the Navajo cases [16] also raise issues relating to the 1868 treaty. In order to prevent potential multiple recoveries, defendant asks that we consolidate the claim presented by supplementary exception 9 with docket No. 229 in which plaintiff seeks to recover additional compensation for cessions of land under the 1868 treaty. It is said that this is necessary because the obligations of the treaty were the consideration for plaintiff's land cessions.[17] According to defendant, proper expenditures may be deducted from the fair market value of plaintiff's lands in determining any additional award constituting fair consideration for the ceded lands, but improper expenditures may not be deducted. The Government also asserts that plaintiff is attempting to claim that the now challenged expenditures are not properly to be considered in docket No. 229 (thereby precluding a deduction from the value of the ceded lands) and is also seeking at the same time to obtain a recovery in this docket No. 69 for the alleged failure to fulfill treaty obligations—thus obtaining the effect of a multiple recovery.

We are faced with a situation where there are several separate, but potentially overlapping dockets, all relating generally to claims by the Navajo Tribe against the United States. In these circumstances, defendant might have a legitimate concern about double recovery, except for one significant factor. A single trial judge will hear all of these related dockets, and will be able, where necessary, to take appropriate

16. This docket is composed of the accounting claims from docket Nos. 69, 299 and 353. These claims were consolidated in *Navajo Tribe v. United States*, 31 Ind.Cl.Comm. 40, 59 (1973), and separated from docket 69's non-accounting claims in *Navajo Tribe v. United States*, 35 Ind.Cl.Comm. 305, 311 (1975). In addition, there is now pending before this court, docket No. 229. Docket No. 69 (claims 1–6, 8), containing the non-accounting claims of the original docket No. 69, was dismissed by the court in *Navajo Tribe, supra*, 220 Ct.Cl. —, 601 F.2d 536.

17. Plaintiff disputes defendant's position that the *sole* consideration for defendant's payments under the 1868 treaty was cession of plaintiff's aboriginal lands. Plaintiff argues that this issue may be decided in its favor, in which case consolidation would not be appropriate, since docket No. 229 deals only with consideration for land cessions under the 1868 treaty, not with fulfillment of 1868 treaty obligations generally, as supplementary exception 9. *See, Saginaw-Chippewa Indian Tribe of Michigan v. United States*, 30 Ind.Cl.Comm. 295, 305–06 (1973).

steps such as setoffs to avoid any double recovery which might otherwise occur. The trial judge is clearly aware of defendant's concern, as evidenced by his opinion now under review, in which he states several times that double recovery will not occur as a result of any possible overlaps in pleadings. We believe that the trial judge will have no difficulty preventing plaintiff from recovering more than once for any improper expenditures. We therefore reject defendant's request for consolidation, at least at this stage of the proceedings, because the expenditures questioned by supplementary exception 9 are properly part of the consolidated accounting claims of this docket No. 69, and because we believe the trial judge will be able to avoid double recovery without the necessity of further complicating this case with additional consolidations.[18] The trial judge is free, however, to order consolidation at a later step in the proceedings if he considers that remedy called for by the status of the litigation at the subsequent time.

In connection with its consolidation argument, defendant now contends, in addition, that the exception relates to the dismissed claims in docket No. 69, rather than to the accounting claim in this docket, which was not dismissed, and therefore that supplementary exception 9 must be dismissed under *Navajo Tribe, supra*, 220 Ct.Cl. ——, 601 F.2d 536. We have considered that problem in Part III of this opinion, *supra*, and hold there that an issue in general accounting claim 7 can and may properly fall within the scope of that accounting claim, as opposed to a non-accounting claim dealing with subject matter similar to that encompassed by the accounting claim. Such is the case here, where supplementary exception 9 is directed specifically at disbursements of tribal funds listed in a GAO accounting report. This report was submitted by defendant in order to comply with plaintiff's request for an accounting under claim 7 and the other accounting claims in the dockets. The exception, as an exception to certain treaty expenditures listed in that accounting report, relates to claim 7, which is an independent and timely filed request for a full equitable accounting of defendant's management of plaintiff's trust property and money. Claim 7 therefore gives this court jurisdiction over matters coming within the scope of the accounting, including this exception. To the extent that there is any overlap of claim 7 and claims 4, 5 and 6, they may be considered alternate pleadings, and voluntary dismissal of some does not require dismissal of the others.[19]

VII

In the preceding Part VI of this opinion, we denied defendant's request that we dismiss all of supplementary exception 9. In addition to this request for a blanket dismissal, defendant has asked us to review certain segments of that exception questioning some specific expenditures. We are concerned here with an exception to disbursements totalling $1,504,839.57, appropriated for educational purposes.[20] Plain-

18. In so deciding, we have considered and rejected defendant's argument that consolidation is proper because the parties have presented substantial evidence in docket No. 229 relating to the propriety of expenditures made to fulfill 1868 treaty obligations. In a complex and inter-related case such as this one, some overlap of factual evidence is inevitable, and is not a sufficient reason to further burden this case with additional changes in form.

19. In *Navajo Tribe v. United States*, 34 Ind.Cl. Comm. 432 (1974), the Indian Claims Commission rejected defendant's argument that a particular exception was not valid because it related to claim 5 of plaintiff's original petition in docket No. 69 (dealing with defendant's actions with regard to plaintiff's resources and tribal property), which was deleted in plaintiff's amended petition, *id.* at 433. The exception related to the accounting report's failure to provide basic information about various sources of revenue. The Commission found that the exception was not affected by the dismissal of claim 5, because it came within the scope of the general accounting claim (claim 7). *Id.* This analysis is equally valid with regard to defendant's argument concerning dismissal of supplementary exception 9.

20. The seventeen appropriations at issue were made in 1913 through 1928, and basically provided that they were for the purpose of carrying out Article VI of the 1868 treaty. Article VI provides that "[i]n order to insure the civiliza-

tiff excepted to the 1914–1930 expenditures under those appropriations as being too late, poorly conceived and executed, and not for the benefit of the Navajos.

Defendant's motion to dismiss was based primarily on the contention that its obligations under Article VI of the 1868 treaty were limited to a ten year period from 1868 to 1878, and therefore did not extend to the appropriations made in 1913–1928. The trial judge found that the Government's obligations under Article VI were, in fact, limited to the ten years following the 1868 treaty, but declined to dismiss the sub-exception we are now considering (Part CXXIII of trial judge's opinion). He found that plaintiff had a right to know whether any of the funds expended under the 1913–1928 appropriations were applied to non-Navajo beneficiaries in contravention of the appropriation acts, and, even though this was not specifically requested, he construed the exception in that way in order to avoid the need for amendment. We affirm the trial judge's denial of defendant's motion to dismiss this sub-exception.[21]

Under 25 U.S.C. § 70k (1976), claims under the Indian Claims Commission Act had to be submitted before August 13, 1951, or they are barred. Defendant contends that the trial judge's modification of the sub-exception to include a claim under the 1913–1928 appropriations is incorrect because such a claim is barred since it was not timely pleaded under section 70k. In reaching this conclusion, defendant relies on our decision in *Navajo Tribe, supra*, 220 Ct.Cl. —, 597 F.2d 1367. There, we rejected the Navajo Tribe's attempt to amend its petition in docket No. 229 to state a new land claim relating to the Bosque Redondo reservation because, *inter alia*, neither the original nor the amended petitions referred to the land at issue, or to the statute or executive order creating the reservation. Id. at —, 597 F.2d at 1370 (1979). The doctrine of relation back could not be used to amend the petition to include the new claim (see Indian Claims Commission Rule 13(c) and Court of Claims Rule 39(c)), and it was barred by the applicable statute of limitations contained in section 70k. *Id.* at —, 597 F.2d at 1370–71 (1979).

Reliance on that *Navajo Tribe* decision is misplaced, because in that instance there was no nexus between the claims in the original and amended petitions, and the new claim plaintiff attempted to add. Here, however, the questioned exception had a clear relationship to the timely pleaded claim for a general accounting (claim 7), and relation back is proper. *See Menominee Tribe of Indians v. United States*, 102 Ct.Cl. 555, 564 (1945). The seventh claim asks for a true and complete accounting of transactions carried out by defendant, its agents, and employees with regard to plaintiff's property and assets. It specifically alleges that defendant has violated its duties as guardian in that funds appropriated by Congress for plaintiff's use and benefit have come into defendant's possession as a result of the trust relationship, and that defendant has failed to adequately or correctly account "for such * * * disbursals, and disposal of such * * * payments * * *." Thus, the language in claim 7 is more than sufficient to encompass the accounting exception now before us, *see, Navajo Tribe, supra*, 34 Ind.Cl. Comm. at 433, especially in light of the fact that the appropriation figures in question were provided in response to plaintiff's request for an accounting. *See, Blackfeet & Gros Ventre Tribes, supra*, 34 Ind.Cl.Comm.

tain of the Indians entering into this treaty, the necessity of education is admitted * * *, and the United States agrees that [a schoolhouse and teacher shall be provided for every thirty children] * * *. The provisions of this article to continue for not less than ten years."

21. In so holding, we do not need to reach (on the Government's appeal) the issue of whether the obligations created by Article VI extend beyond the ten year period following execution of the treaty, since we agree with the trial judge that plaintiff's sub-exception is proper even in the absence of a treaty obligation to make the 1913–1928 appropriations. However, in Part IX of this opinion, *infra*, we consider the Tribe's appeal from the trial judge's reiteration of his prior ruling that the treaty obligation on education lasted no more than 10 years.

at 141–42 (accounting reports are part of the pleadings which frame the issues for hearing, and are therefore admissions on which plaintiff can rely).

[12] We agree with the trial judge that, once Congress has appropriated money specifically for plaintiff's benefit, as it did in the 1913–1928 appropriations, the plaintiff has "a legitimate right to know whether any of these appropriations were applied to non-Navajo beneficiaries in contravention of the appropriation acts," Trial Judge's Opinion at 164, and cases cited *supra*, regarding defendant's fiduciary accounting duties, and we hold that the trial judge acted within his discretion in construing the sub-exception to request such an accounting. We find, accordingly, that this exception is properly within the scope of claim 7.[22]

VIII

The Tribe's requests for review which we consider involve mainly the extent of the Government's obligation to make tribal funds productive either by depositing them in interest-bearing accounts or by investing them fruitfully. Plaintiff challenges a number of the trial judge's holdings in this area (Parts LXXXVIII, LXXXIX, XC of the trial judge's opinion).

[13] The trial judge is correct that it is the settled law of this court that, to recover interest or damages for non-investment, Indians must show statutory, treaty, or contract authority calling for the payment of interest or for investment of tribal funds. *See Mescalero Apache Tribe, supra*, 207 Ct.Cl. at 385, 518 F.2d at 1319; *Cheyenne-Arapaho Tribes, supra*, 206 Ct.Cl. 340, 512 F.2d 1390; *Gila River Pima-Maricopa Indian Community, supra*, 218 Ct.Cl. at ——, 586 F.2d at 216–17 (1978). The problem here is the existence or not of such authority for various funds, deposits, and accounts.

A. Plaintiff argues strongly that funds required by law to be deposited in IMPL accounts at 4% interest were wrongfully deposited and held by defendant in other, non-interest bearing accounts (e. g. "IIM", or "IMPL, Agency" accounts). It is also said that certain other tribal funds (not required to be deposited in interest-paying IMPL accounts) were improperly (*i. e.* contrary to law) placed in commercial accounts or totally non-productive deposits, or the interest was paid to the Government (not for the benefit of the Navajos).

The trial judge does not directly address these points and we cannot say that the contentions are frivolous or insubstantial on their face (or as argued to us). But at the same time we are not in a position to resolve these issues, several of which embody factual components. We think therefore that they should be investigated further and plaintiff should be permitted to show, if it can, that such deposits of tribal funds in non-interest bearing or non-fruitful accounts were wrongfully made. To that end we vacate the trial judge's dismissal of supplementary exception 5a (and Part LXXXVIII of his opinion) and remand for further proceedings on that exception.

B. The Navajos' separate point that, in the period before July 1, 1930, the Government had a duty to invest plaintiff's funds in trust has already been rejected (*sub silentio*) in large part in *Mescalero Apache Tribe, supra*, 207 Ct.Cl. 369, 518 F.2d 1309. The 1883 and 1887 statutes on which plaintiff now relies were before the *Mescalero* court but were not accepted as imposing such a duty to invest or make productive.[23] *Id.* The trial judge did not err in following *Mescalero* in this respect.[24]

22. Defendant repeats, in challenging this sub-exception, several of the same contentions we have rejected (in Part VI of this opinion, *supra*) in connection with the main exception. Our discussion in Part VI applies to this sub-exception as well.

23. The writer of this opinion, dissenting in *Mescalero*, discussed these statutes at some length, and thought them applicable, but the majority of the court did not agree.

24. On the other hand, it may very well be that the *Mescalero* court did not consider section 28 of the Act of May 25, 1918, ch. 86, 40 Stat. 561, 591, or the Act of June 24, 1938, ch. 648, 52 Stat. 1037. On remand, the parties and the trial judge may appraise the impact of those pieces of legislation. To that extent Part LXXXIX of the trial judge's opinion is vacated.

C. The third of the Tribe's "interest" points is that it was entitled, in the period after July 1, 1930, to have the interest earned on its tribal funds placed in interest-bearing accounts or otherwise invested productively. *Mescalero* held that compound interest is not allowable in the absence of statutory permission (which does not exist in this instance) and, on the authority of that decision, we must reject the claim that interest earned on tribal funds should have been deposited, when earned, in interest-bearing accounts. *Id.* at 404, 518 F.2d at 1331.

[14] As for a separate obligation to invest tribal funds productively—whether those funds be earned interest or other tribal funds—the matter is not at all clear at this stage, and does not seem to have been sufficiently canvassed at the trial level. The presentation, based on Congressional enactments, made to us on this point by plaintiff and by the brief amicus curiae is substantial. We think, again, that the problem deserves further consideration, and we remand the issue to the trial judge so that he can reconsider it in the light, not only of *Mescalero*, but also of *Cheyenne-Arapaho* (which was not overruled by *Mescalero, see Mitchell v. United States*, 219 Ct.Cl. ——, ——, 591 F.2d 1300, 1306 n. 21 (1979), *rev'd on other grounds*, —— U.S. ——, 100 S.Ct. 1349, 64 L.Ed.2d 607 (1980), and the pertinent legislation which was not rejected in *Mescalero (see supra)*—as well as the relevant facts to be proved. To facilitate this reconsideration, we vacate Parts LXXXIX and XC of the trial judge's opinion to the extent they prevent such reconsideration from taking place.

IX

[15] The trial judge repeated, in passing, his prior holding that the Government's obligation under the 1868 treaty to provide education for the Navajos lasted for no more than 10 years. The Tribe seeks review of this ruling, and though it is not necessary to consider it in order to deal with the particular supplementary exceptions now before us (*see* Part VII of this opinion, *supra*), we do so because the holding is a dispositive one and may play a significant role in determining the full extent of defendant's fiduciary obligations under the 1868 treaty.

Article VI of the treaty provided as follows:

> ARTICLE VI. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.
>
> The provisions of this article to continue for not less than ten years.

We agree with the trial judge that, in the absence of very strong materials suggesting the contrary, the second paragraph must be taken literally to mean that the defendant's obligations under the Article were not to continue for more than 10 years. In fact, Congress made ten consecutive payments for Navajo education, beginning in 1871 and ending 1880. The tenth appropriation expressly said: "*For last of ten installments*, for pay of two teachers per sixth Article of treaty of June first, eighteen hundred and sixty-eight, two thousand dollars * * *." Act of May 11, 1880, ch. 85, 21 Stat. 114, 121 (emphasis added). There were no further appropriations for Navajo education until 1913.

The Navajos rest on these later appropriations for 1913–1928 (discussed *supra* in Part VII of this opinion, on the defendant's appeal) which stated that they were for the purpose of carrying out Article VI of the 1868 treaty. But the impact of such later Congressional expressions depends on their nearness, sharpness, and relevance to the statute or treaty being interpreted. *See, e. g. Securities and Exchange Commission v. Capital Gains Research Bureau*, 375 U.S. 180, 199–200, 84 S.Ct. 275, 287, 11 L.Ed.2d 237 (1963); *Waterman S. S. Corp. v. United States*, 381 U.S. 252, 268–69, 85 S.Ct. 1389, 1398, 14 L.Ed.2d 370 (1965). There was a gap of 23 years between the 1880 appropriation act declaring that it was the last of ten installments and the 1913 appropriation; in addition, the 1913 appropriation came some 45 years after the treaty. Nor are we cited to legislative history of the 1913–1928 statutes spelling out clearly that Article VI was intended to last indefinitely or until the educational goal was fully achieved.[25] As shown in Part VII, *supra*, these later appropriations can stand as educational appropriations to the Navajos even if one disregards the mention or scope of the 1868 treaty. In these circumstances, we do not consider the citation of the treaty in these later acts as overcoming the plain words of Article VI itself.

Plaintiff asks that, if we do not reverse the trial judge outright, we at least remand this issue for trial. But nothing at all specific has been proffered to us, either in the briefs or at the oral argument, suggesting that a trial will uncover or reveal materials helpful in the interpretation of the meaning of the second paragraph of Article VI. A trial is not warranted simply because a party says, conclusorily and summarily, that it has evidence (entirely unspecified) showing that the parties to the 1868 treaty did not intend the second paragraph of Article VI to mean what it says in words.

25. Plaintiff cites *Indian Appropriation Bill, Hearing before a Subcommittee of the House Committee on Indian Affairs*, 63rd Cong., 2d Sess. 327–31 (1913), but that discussion shows no more than that the Interior Department believed at that time that (1) the Government had "moral obligations" to provide adequate school facilities for Navajo Indian children, and/or (2) the Government had not provided adequate educational help under the treaty during the ten years the treaty obligation lasted, and further appropriations were needed in 1913 to meet that unfulfilled 10-year obligation.

26. We include in this category those dispositive items, or other significant questions (even if not dispositive), which we consider worthy of appellate treatment by us at this time.

X

The remaining dispositive issues presented by plaintiff[26] may be considered concisely. The Tribe's challenge to the return to the Treasury of surplus, unexpended treaty appropriations should not have been rejected, as it was, without giving the plaintiff a chance to prove that the United States had failed to comply with its treaty obligations (Part CIII of the trial judge's opinion). That disposition is reversed. Also, the total dismissal on legal grounds of supplementary exception 7 (relating to return to the Treasury of portions of funds appropriated to fulfill treaties) in the same Part CIII of the trial judge's opinion is vacated insofar as that ruling relates to the appropriation for the removal of the Indians from the Bosque Redondo reservation (Art. 12 of the 1868 treaty); the trial judge will reconsider the issue as it relates to that particular appropriation, particularly in the light of other portions of his opinion dealing with the appropriation for the removal from Bosque Redondo. The segments of the trial judge's opinion (to the extent unfavorable to plaintiff) dealing with the issue of whether treaty payments were for the benefit of individuals or of the Tribe are affirmed as acceptable. *See* Parts CXI, CXIV, CXXI, CXXXI, CXXXIII of the trial judge's opinion. The *sua sponte* striking by the trial judge of the request for an accounting of "removal expenses" (Parts CXXVI and CXXVII of the trial judge's opinion) is vacated and the issue is to be reconsidered on the basis of the full information available.

Finally, we think that the trial judge should reconsider, in the light of *Navajo Tribe, supra*, 218 Ct.Cl. at ——, 586 F.2d at 204–05 (1978), the chronological presumption he established with respect to post-1946 "continuing wrong" claims. For that purpose we vacate Part LXXVII of his opinion.

CONCLUSION

The case is remanded to the trial judge for further proceedings consistent with this opinion.

O